

No. 13039

United States
Court of Appeals
for the Ninth Circuit.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Association, and EUGENE J. O'RILEY,
as Trustee in Bankruptcy of the Estate of
UNITED PRODUCE COMPANY, a Corpo-
ration, Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a National Banking Association,

Appellee.

Transcript of Record
In Three Volumes
Volume III
(Pages 833 to 1156)

Appeals from the United States District Court,
Northern District of California,
Southern Division.

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[Title of District Court and Cause.]

DEPOSITION OF FREDERICK
C. MESSENGER

* * *

Direct Examination

By Mr. Erskine:

Q. The record shows a balance, a credit balance, as of the close of business on November 13th, 1948, of \$241,525.04; is that right?

Mr. Lasky: It speaks for itself, does it not?

A. In so far as that record is concerned, it shows that balance, but that was not the balance of the United Produce Company on that date.

Q. (By Mr. Erskine): What was the balance of United Produce Company on that date?

A. That figure——

Mr. Erskine: Pardon me; I will withdraw that question, and we will perhaps come to it later on.

Q. At any rate, Mr. Messenger, when the six checks were debited against the account of the United Produce Company as of November 15th, 1948, they were debited against what the books showed a credit balance to the account of that concern, as of the close of business on November 13, 1948, of the amount I have stated, that is \$241,525.04; that is correct, is it not?

A. Those charges were made against the balance indicated. [63*]

Q. Now, I notice on this Defendant's Exhibit No. 2 for identification that, in the entries that were

(Deposition of Frederick C. Messenger.)

made on November 17th, 1948, an entry was made on the debit side, of \$228,843.01, which was thereafter stricken out, and alongside of that item appear in handwriting the initials "E. C."

Mr. Lasky: Pardon me, but will you show me, please, what you are referring to now?

Mr. Erskine: Just a moment. Let me finish my question first.

Q. (Continuing): Will you tell me, please, what that item was, and why it was stricken out, and why those initials "E. C." were put on there?

A. The balance indicated here on November 16th, was \$228,843.01; and the bookkeeper, in making up this balance under the November 17th date, did not return her carriage to the proper place, and this transaction was posted where checks are normally posted; and the marking out of that, with the initials "E. C." means "Error Corrected."

Q. In other words, that item of \$228,843.01, instead of being shown in the debit column, should have been shown in the column to the left, which is not shown on [64] the statement itself; is that correct?

A. It should have been shown on our journal sheet.

Q. On your journal sheet? A. Yes.

Q. To represent the balance to the credit of the customer as of the beginning of that day, that is, November 17th, 1948. A. Yes, sir.

Q. But instead of putting it on the journal

(Deposition of Frederick C. Messenger.)

sheet, the bookkeeper by mistake put it in the column showing the debits? A. Yes, sir.

Q. And thereafter struck it out, and showed the change? A. Yes, sir. [65]

* * *

Q. (By Mr. Erskine): When were they stricken out? A. On the 19th.

Q. After they had been posted?

A. Yes, sir.

Q. Now, Mr. Messenger, we have been referring in this case to the six checks which are the principal part of the controversy in the case. I show you the third page of this Defendant's Exhibit No. 2 for identification, and will ask you to state whether or not the six checks are entered on this page as of November 19th.

Mr. Lasky: Pardon me; you mean the fourth page, do you not?

Mr. Erskine: Or rather—yes. Pardon me. I meant to refer to the fourth page.

A. Those are entries of November 19th.

Q. (By Mr. Erskine): I will call your attention to this fourth page of the exhibit, where there is a faint bracket, with the numeral 113 appearing opposite the bracket. A. Yes?

The checks within the bracket are the six checks, are [74] they not, Mr. Messenger?

A. That is right.

Q. And that entry, the entry of those six checks, was made on November 19th, was it?

(Deposition of Frederick C. Messenger.)

A. November 19th is the entry date of those on the bank, yes, sir.

Q. And at the same time that they were entered, or contemporaneously with the entry of those items in the credit column as of November 19th, they were stricken out; is that right? A. Yes, sir.

Mr. Erskine: Off the record, Mr. Reporter.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: Shall we recess at this time until one-thirty?

Mr. Lasky: That is agreeable.

(And thereupon, at the hour of 12:30 o'clock p.m., the taking of said deposition was recessed until the hour of 1:30 o'clock p.m. of the same day, Saturday, December 3rd, 1949, at the same place.) [75]

* * *

Direct Examination

(Continued)

By Mr. Erskine:

Q. Mr. Messenger, before proceeding to take up with you the next thought that I have in mind, I would just like to make sure about one thing, and that is this: These entries on the fourth page, I believe it is, of Defendant's Exhibit No. 2 for identification, in the deposit column, and the credit column, which were stricken out as of November 19th——

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Just a moment. I object to that question as being incorrect. There is nothing on this document that shows that they were stricken out as of any date.

Mr. Erskine: That is correct. Let me reframe the question.

Q. Referring to Defendant's Exhibit No. 2 for identification, that shows on the fourth page thereof the entry in the deposit column of the six checks as of November 19, 1948: That entry, pursuant to the practice of delayed posting, was entered on the 20th of November, was it not? A. Yes, sir.

Q. And of course the items were stricken out after they were posted; that is obvious, is it not?

A. The items were stamped with that [77] line——

Q. After?

A. ——after they were posted.

Q. After they were posted? A. Yes, sir.

Q. Do you know when they were so stamped?

A. After the posting.

Q. After the posting was done, do you know when they were so stamped? A. The 20th.

Q. On the 20th? A. Yes, sir.

Q. At whose direction was that done?

A. It is the practice to do that; that is the general practice of the bank.

Q. Well, at whose direction was the practice followed in this instance? Was it yours, personally?

A. That practice has been in existence for a good

(Deposition of Frederick C. Messenger.)

many years, and I had some part in establishing the practice at the beginning, but just when that was, I do not know.

Q. Well, the practice to which you refer, I take it, is the practice of striking out an item when the check is returned; is that right?

A. That is right. [78]

* * *

Q. (By Mr. Erskine): So, as I see it, Mr. Messenger, looking at this, these three columns under the heading "Notes Payable," particularly the second and third lines on the front side of Exhibit 23-A, you have a payment on that day from your collateral account of \$18,075.30 reducing the debt of the United Produce Company from \$200,000.00 to \$181,924.70, and on the same day you have made a loan of the amount of the payment, namely, \$18,075.30, to United Produce Company, so as of that day the indebtedness of United Produce Company to the bank on its note account remanded the same as it had on the preceding day, that is, \$200,000.00.

A. That is correct.

Q. And that is so, apparently, throughout the period as indicated by the entries made in the columns under the title "Notes Payable"?

A. The entries appearing on Defendant's Exhibit 23-A through 23-M under the "Notes Payable" title are the same type of entries, subject to adjustments, which appear therein. I believe each adjustment [277] is indicated with a little "X" on it, and

(Deposition of Frederick C. Messenger.)

is true up through the entry appearing December 1, 1948, the entry appearing on December 6, 1948, and thereafter representing the entries made by the bank and not being applicable to transactions between the United Produce Company and the Merchandise National Bank direct.

Q. In other words, the entries on December 6 and thereafter, like the other entries on the other records of the same day, thereafter were made for the convenience of the bank in closing up the situation and not to reflect any business transactions between it and United Produce Company?

A. That is correct.

Q. Now, you have another record there. What does that record show? Is that your draft account?

A. That represents the liability ledger covering drafts discontinued for the United Produce Company.

Mr. Erskine: I would like to have the Reporter mark these documents as Defendant's Exhibits beginning with Defendant's Exhibit 24-A, mark them for identification.

(Whereupon said documents above referred to were thereupon marked by the Reporter as Defendant's [278] Exhibits 24-A to 24-III for identification.)

Q. (By Mr. Erskine): Now, Mr. Messenger, these exhibits Defendant's Exhibit 24-A to the end represent what?

A. These sheets running from Defendant's Ex-

(Deposition of Frederick C. Messenger.)

hibit 24-A to 24-III represent the liability ledger sheets covering drafts discounted by the United Produce with this bank.

Q. For the period indicated by the sheets?

A. For the period indicated by the sheets.

Q. Now, just in order to try to clarify the thing so I will understand it, Mr. Messenger, take the first page here, the front of the first page, Defendant's Exhibit 24-A for identification, and there is a date under the column headed "Date," on the left-hand side of the sheet, the first date appearing appears to be December 31, 1947, the "7" seems to be stricken out, but I have no doubt that was what was intended, and opposite that date is the number 127,030, and I take it that represents the number of the draft?

A. Represents the number which the bank placed on the draft as a means of identification. [279]

Q. The other numbers appearing in that same column, which is entitled "Memorandum," and under the word "Memorandum" the words "Endorser" or "Maker," represent the same thing, that is, the numbers given by the bank to the drafts of the United Produce Company which were delivered to it?

A. That is correct.

Q. That is so throughout the sheets?

A. That is true.

Q. The sheets of this same Exhibit 24?

A. That is true. Without referring to every sheet, referring to the first page, this represents the numbers that the bank has given as an indica-

(Deposition of Frederick C. Messenger.)

tion or identification of those particular drafts.

Q. Have you any reason for believing that there is any difference in the other sheets, in the numbers appearing in the other sheets under the same column?

A. There would be no difference in so far as numbers is concerned, but it is possible that under that memorandum column there might be some other memorandum of some kind in there.

Mr. Lasky: There are 208 pages in that exhibit.

Q. (By Mr. Erskine): So far as the numbers shown in that column are [280] concerned, they all represent numbers given by the bank to the drafts and delivered to it by the United Produce Company?

A. That is correct.

Q. Now, I have used "Delivered to it" Mr. Messenger, but would it be proper for me to say "The drafts discounted by the Merchandise Bank for the United Produce Company," is that the banking term given to the operation under which you took these drafts?

A. The United Produce Company did deliver the drafts to us, and we did discount them for them.

Q. Yes. And that is the proper description of the operations shown on this exhibit for identification 24-A to 24-III with respect to all the drafts shown on the sheet?

A. That is right.

Q. The United Produce Company delivered those drafts to you, that is, to the bank, and the bank discounted the drafts for the United Produce Company?

A. That is correct.

(Deposition of Frederick C. Messenger.)

Q. Now, I show you, Mr. Messenger, the next column in which any figures appear on this sheet, the front of this sheet, 24-A, and that is the column headed "Debits," and I will ask you to tell me what the [281] figures in that column indicate.

A. Those figures represent the amount of the individual drafts discounted, the face amount of those drafts, each line covering an entry for an individual draft.

Q. Going down to the number 127,410, opposite the date December 31, 1947, on this, the front of this sheet 24-A, there is a figure in the debits column, \$1,762.00: I take it that is the amount at which the United Produce Company discounted with the bank the draft bearing that number 127,410?

A. That is the amount of the draft that the bank discounted for United Produce Company.

Q. That is a better statement of it. It is the amount of the draft which the bank discounted for the United Produce Company. Now, when the bank discounted these drafts referred to on this Exhibit 24, did it pay the United Produce Company on that discounting of the draft the face amount of the drafts?

A. The bank credited the commercial account of the United Produce Company with the face amount of the draft.

Q. Now, we have here another column on this Exhibit 24-A to 24-III, entitled "Credits," and on the front [282] of this sheet——

A. (Interposing): Pardon me, could we con-

(Deposition of Frederick C. Messenger.)

tinue to refer to this particular page so it would not be necessary for me to go through all of them? The only purpose I had in mind, if I am going to refer to it as a whole procedure I would want to examine each individual sheet. If we are talking about the particular entries on one sheet, that is one thing.

Q. I can see what you mean. I suggest this, Mr. Messenger, that in my examination of you that I will refer to the front of Defendant's Exhibit 24-A for identification, then at your leisure you examine the rest of the sheets, and if you find any exceptions to what you will testify about the face of the sheet 24-A, you can state those exceptions later, tomorrow or the following day, would that be convenient for you?

A. I will leave that to counsel to determine.

Mr. Lasky: You can ask him about the face of 24-A and his answer will apply to 24-A. I would not want the assumption that his answer would apply to the whole thing, if he does not speak about it again.

Q. (By Mr. Erskine): Your answers will apply only to the face of the sheet 24-A. But, at some later time during the taking [283] of these depositions I will ask you if your answers apply to all the sheets, and if they do not, that is, your answers with respect to the face of the sheet 24-A, the answers you will give with respect to the face of the sheet 24-A will apply to all these sheets, and if they do not the exceptions in which they do not apply you

(Deposition of Frederick C. Messenger.)

at that time can give me the exceptions. Is that all right?

Mr. Lasky: That is an awful task you are giving him to read those pages.

Mr. Erskine: I want the information. Otherwise I will be left up in the air.

The Witness: I don't like to make an answer and answer questions relative to one particular sheet, and then have my answer construed to mean that it applies to all of the sheets that are there.

Mr. Erskine: I have made it perfectly clear that I will take the answers that you give this afternoon as applicable only to the face of Exhibit 24-A.

Mr. Lasky: Then if time permits he will look at the rest, so that you can put another question to him about the rest of it later.

Q. (By Mr. Erskine): Later on I will ask you whether or not the [284] answers which you will give this afternoon and they, according to our understanding, will apply only to the face of the sheet 24-A, and I will ask you if those answers apply to the rest of the sheets, and you can then tell me, after you have examined the other sheets at your leisure. Then, to go ahead, I call your attention to the column on the face of 24-A, "Credits," and I call your attention to the fact that there are certain dates given on certain lines of that column, and figures given on other lines of that column: Will you please explain the dates and the figures——

A. The dates appearing in the credit column on Defendant's Exhibit 24-A represent the date on

(Deposition of Frederick C. Messenger.)

which the amount appearing just before it, the draft covered by that amount was eliminated from the record by having received payment from the bank, to whom this draft, was sent for collection. There is a possibility that maybe some of these drafts were returned unpaid, and in that case, the date would indicate the date which that draft was charged back against the United Produce Company account.

Q. In other words, the date indicates either the date of payment or the date of charge-back? [285]

A. That is correct.

Q. Does the sheet show which of those things was true with respect to the draft to which the date applies?

A. Without going through all of them it would be hard for me to make a statement.

Q. Can you find any entry there which indicates which of those two things was done? Take the face of the sheet——

A. On the first sheet there is nothing to indicate the disposition either way.

Q. I see. The entry itself does not indicate whether the draft was paid or charged back?

A. That is right.

Q. Was there any record kept in the bank which would indicate whether the draft was paid or charged back?

A. A copy of the collection letter in which these drafts were sent out for collection would bear an

(Deposition of Frederick C. Messenger.)

indication of whether or not the draft was paid or charged back.

Q. If the draft was paid by someone other than the drawee of the draft would the collection letter indicate that?

A. The collection letters are sent to other banks and we receive their payment or the return of the draft [286] unpaid. We would not have any record of what actions the bank to whom we sent the item took in so far as whether it was paid by the drawee or by somebody else.

Mr. Lasky: You could have answered the question "No."

Q. (By Mr. Erskine): Now, Mr. Messenger, I don't know as I got clearly the first part of that. Let us take this draft we mentioned a while ago, the one which your bank discounted for the sum of, the draft which was for the sum of \$1,762.00, to which your bank gave the number 127,410, and opposite that figure \$1,762.00 is the date January 14, 1948: Do I take it, I may be quite wrong about this, do I take it that your answer means that on January 14, 1948, that particular draft was paid and your bank received payment?

A. It was paid on that day.

Q. Or charged back?

A. Or charged back?

Q. Yes; and the other dates in this column headed "Credits" on this sheet 24-A indicate with respect to the drafts, the amount of which is opposite dates in the column "Debits" the same thing, either payment [287] or a charge-back?

A. That is right.

(Deposition of Frederick C. Messenger.)

Q. I call your attention to the figures in this column headed "Credits," and I will ask you what do they refer to.

A. Those figures refer to the amounts of drafts that were paid or charged back on the dates on which those entries appear, and in the memorandum column are numbers which refer to the identification number that had been given those drafts when they were originally discounted.

Q. Now, I notice, Mr. Messenger, that the fifth figure under the date of December 31, 1947, appearing on sheet 24-A, is 127,137, which is a lower figure than the first figure appearing opposite that date, of 127,410, so evidently the figure in the fifth line to which I referred refers to a draft which had been discounted by the bank prior to the transaction in which the first figure 127,410, before the draft designated by that figure, 127,410, was discounted by the bank?

A. That is true.

Q. And so the figure opposite the figure in the column headed "Credits," opposite the designation 127,137 [288] refers to the payment or charge-back of a draft which had been discounted at the bank prior to the draft which the designation 127,410 refers?

A. That is correct.

Q. Now, it still leaves me somewhat up in the air because as I understood you the date January 14, 1948, on the same line as the designation 127,410, refers to the payment or charge-back of that particular draft?

A. If you will refer to the sheet showing the

(Deposition of Frederick C. Messenger.)

date of January 14, under the line you will note that there is a line indicating payment or charge-off.

Q. Indicating the disposition of draft 127,410, is that right?

A. That is right. On the back of Defendant's Exhibit 24-C there is an entry indicated by number 127,410 which shows a credit of \$1,762.00.

Q. Yes, I see. In other words, each draft referred to on this Exhibit 24 is referred to twice, first on the date when it is discounted by the bank, and then when it is either paid or charged back?

A. That is correct.

Q. Now, you have another title of "Unsecured," over two columns, "Indirect" and "Direct." Would you mind explaining to me to what those columns refer on that sheet 24-A, the face of the [289] sheets?

A. The heading "Unsecured" followed by sub-headings "Indirect" and "Direct," as headings, have no bearing covering the figures that appear in those columns below. The figures that are listed in the column marked "Indirect" represent the total of drafts discounted on the date on which that line appears, and, the figures that appear in the column marked "Direct" represent the total of the drafts which were either paid or charged back on the date indicated for those lines.

Q. I think that is pretty clear. In other words, the headings "Indirect" and "Direct" have no reference to the figure in those columns?

(Deposition of Frederick C. Messenger.)

A. That is correct.

Q. Taking that first figure that appears in the column "Indirect," \$10,225.27, that represents the total of the drafts in the hands of the bank discounted for United Produce Company as of that date?

A. No, sir, discounted on that date.

Q. Discounted on that date. And the column and the figures appearing in the column marked "Direct" represent the total of the drafts either paid or charged back as the, the date indicated?

A. That is correct.

Q. Then you go over to the right-hand side here, [290] the column headed "Total liabilities," and you have a figure in that column in the third line of, the fact of the sheet 24-A, \$150,406.44. That, I take it, is the total of drafts discounted by the bank for United Produce Company as of that date, January 7, 1948?

A. Not as of January 7, 1948, because that date there is just——

Q. In the credits column?

A. ——a memorandum date on which the draft——

Q. Oh, yes.

A. ——indicated there was paid or charged back. This amount of \$150,406.44 would be the amount of drafts discounted and owned by Merchandise National Bank at the close of business December 29, 1947.

Q. December 29, 1947. I see. And the next

(Deposition of Frederick C. Messenger.)

figure appearing in that column headed "Liabilities," on the face of the sheet 24-A, the figure \$147,270.48, that is the total of the drafts discounted by the Merchandise Bank for United Produce Company as of the close of business on December 31, 1947? A. That is right.

Q. In other words, on the face of this sheet 24-A, the date which is applicable to the figure in the column headed "Liabilities" is the date on the left-hand side of the sheet? [291]

A. That is right.

Mr. Erskine: Now, subject to the suggestion I made a while back, Mr. Messenger, that you review the other sheets, in the light of your testimony, in order to let me know whether or not your testimony with respect to the face of the sheet which has been marked Defendant's Exhibit 24-A for identification, is applicable to the other sheets, I will discontinue my examination of you at this time with respect to that particular Exhibit.

Now, off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: Well, now, I think we had better have this on the record. You are requesting now exactly what document?

Mr. Erskine: I am asking for a copy of an agreement which I understand exists between the Merchandise Bank and the United Produce Com-

(Deposition of Frederick C. Messenger.)

pany, under which the Merchandise Bank, according to my understanding, maintained and operated the business transactions between it and the United Produce Company.

Mr. Lasky: Well, what I have before me is not any agreement with the United Produce [292] Company.

Mr. Erskine: Not signed by the United Produce Company?

Mr. Lasky: Yes, it is signed—the document is signed by the United Produce Company.

Mr. Erskine: May I have that document? I think it relates to what I want to examine the witness about.

Mr. Lasky: I do not think that you are entitled to it but I will let you see it, anyway.

Mr. Erskine: I would like to have it marked as Defendant's Exhibit No. 25 for identification.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 25 for identification.)

Q. (By Mr. Erskine): Now, Mr. Messenger, Defendant's Exhibit No. 25 for identification is dated September 10, 1945. I have not read it carefully, although I did read it sometime ago, that is, I read it a few days ago, but my recollection is that it relates to the manner in which collateral is to be pledged by the United Produce Company with the Merchandise Bank.

Do you have any supplement to that agreement,

(Deposition of Frederick C. Messenger.)

the document marked Defendant's Exhibit No. 25 for identification?

A. I do not know of any supplement to it, no, sir. [293]

Q. It refers to a maximum loan of \$175,000, whereas the Liability Ledger which you showed me a little while ago shows a maximum loan of \$200,000.

A. I do not know of any written supplement to that memorandum. There were oral arrangements, but I do not know of any written memorandum, I personally do not know of that document being supplemented by a written memorandum.

Mr. Lasky: That is why I said it was not an agreement with the United Produce Company, even though signed by the United Produce Company. It does not purport to be an agreement.

Q. (By Mr. Erskine): As I say, I have not yet read it carefully, but I will examine it carefully, and I am making a note to do that right now.

Now, Mr. Messenger, you have shown me certain records of the Merchandise Bank which we have here. Has the bank any other records which relate to its business transactions with the United Produce Company, other than the ones which we have been discussing?

A. All of the transactions of the United Produce Company with the Merchandise National Bank, so far as I am able to recollect at this moment,

(Deposition of Frederick C. Messenger.)

have found entry in one of the various records which you have here in [294] exhibits.

Q. Now, Mr. Messenger, did the United Produce Company maintain with the Merchandise Bank, or did your bank maintain for the United Produce Company, in relation to its business, an account that was called a Suspense Account, in which cash from time to time was deposited, received by the bank from Accounts Receivable pledged to it by the United Produce Company?

A. In connection with the collateral to the indebtedness of the United Produce Company, or covering the indebtedness of the United Produce Company that we had, there were certain stocks at one time which were held as collateral, and later substituted by bonds.

Q. Do you mean, Mr. Messenger, that later bonds were substituted for the stock—is that what you mean?

A. I mean to say that bonds were substituted for the stocks, yes, sir. [295]

* * *

A. Defendant's Exhibits 30-A and 30-B represent the scheduling of the accounts that United Produce had on our books as of the close of business August 28th, 1948.

Defendant's Exhibit 30-C represents the assignment of those scheduled accounts.

Q. This is a schedule of accounts as of the close of business as of what date, again?

(Deposition of Frederick C. Messenger.)

A. August 28th.

Q. August 28th, 1948? A. Yes, sir.

Q. And I take it, Mr. Messenger, that the practice was in your dealings with United Produce Company to take such an assignment as of the end of each month? A. That is right.

Q. And that assignment would describe the accounts receivable then held by the bank as collateral as of the end of that particular month?

A. That assignment represents the assignment to us of all of the accounts that the United Produce had on their books as of the date indicated.

Q. I see. As of the date that the schedule bears, in this instance, in the instance of Defendant's Exhibit [316] 30-A, August 28th, 1948?

A. That is right.

Q. Now, there is a legend that is written below the total on Defendant's Exhibit 30-B, which is signed on behalf of the United Produce Company. Do you know whose signature that is?

A. Mr. L. D. Rosenthal.

Mr. Erskine: Now, I would like to read that legend into the record because I notice in certain of the other papers it is so faint it is hardly legible, and I will ask you, Mr. Messenger, if this particular legend, that is the legend signed by Mr. Rosenthal, does not read:

“The foregoing names and addresses, the sums and the length of time these sums are shown to be owing exactly describe——”

Q. (By Mr. Erskine): Is that “describe”?

(Deposition of Frederick C. Messenger.)

A. "Describe."

Mr. Erskine: Exactly describe——

Mr. Lasky: Read that again.

Mr. Erskine: "——The foregoing names and addresses, the sums and the length of time these sums are shown to be owing exactly describe and are [317] hereby identified as the indebtedness this day assigned to Merchandise National Bank of Chicago and by this reference are hereby made part of said assignment. Dated this 2nd day of September, 1948."

Q. (By Mr. Erskine): That is a correct reading of the legend, is it? A. Yes, sir.

Mr. Erskine: I do that because in certain of these papers it is quite faint and hardly legible.

Mr. Lasky: It is the same legend provided for in Exhibit 25. [318]

* * *

Q. (By Mr. Erskine): I notice the assignment attached to Defendant's Exhibit 30-A seems to be signed by a man by the name of Oddo. Are you familiar with his signature? [320]

A. Yes; that is Tony Oddo.

Q. I am referring to the signature appearing on Defendant's Exhibit 30-C. Does the signature to the left of Oddo's signature on Defendant's Exhibit 30-C—I take it that is another signature of Rosenthal?

A. That is Mr. L. D. Rosenthal's signature.

Q. Now, in order to be absolutely clear on this—

(Deposition of Frederick C. Messenger.)

I think you may have answered it, but I am not positive—the accounts shown on this schedule Defendant's Exhibits 30-A and B were all of the accounts receivable of the United Produce of that date, that is, August 28th, 1948?

A. It is my understanding that that schedule covered all of the accounts receivable owned by United Produce Company from the people scheduled therein as of August 28th, 1948.

Q. Regardless of the dates upon which the accounts receivable became due to United Produce Company?

A. I believe that to be true.

Q. I will show you these papers, Mr. Messenger, which have been marked 30-A——

Mr. Lasky: Are you through with 30?

Mr. Erskine: Yes.

Mr. Lasky: Let me look at it, please.

Mr. Erskine: Yes. [321]

Q. (By Mr. Erskine): Defendant's Exhibits 31-A to 31-BBB for identification, I will ask you to tell me by way of illustration what the schedule appearing on Defendant's Exhibit 31-A represents.

A. The schedule which is marked as Defendant's Exhibit 31-A represents the accounts pledged as collateral by the United Produce Company for borrowings made that date by the United Produce Company.

Mr. Lasky: "Thate date," you mean the date it bears?

The Witness: That it bears.

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Let me interpose an objection, again, on the ground the document speaks for itself and explains what it is.

Q. (By Mr. Erskine): Now, Mr. Messenger, I take it that all the other papers in this Exhibit 31-A to 31-AAA are of the same nature as those referred to on 31-A, and in checking over these lists, that is, the schedules are the same, not the assignments——

A. May I answer that?

Mr. Lasky: He has not asked a question yet.

Q. (By Mr. Erskine): I would like to have you tell me whether the signatures [322] which these instruments bear are those of Tony Oddo and Rosenthal?

A. You are referring now to both the schedules of indebtedness assigned and also the assignment forms?

Q. Yes; so far as the signature is concerned.

A. These signatures on Defendant's Exhibits 31-A through 31-BBB are the signatures of L. D. Rosenthal and Tony Oddo.

Q. And the schedules included in that exhibit are of the same type as the schedule appearing on 31-A?

A. The schedules are all the same, in the same type as 31-A.

Q. Now, tell me this, Mr. Messenger, these schedules indicate that frequently during the month, almost daily during the month—frequently during the month would be better—accounts receivable were assigned by United Produce to Mer-

(Deposition of Frederick C. Messenger.)

chandise, and at the end of the month a schedule similar to Defendant's Exhibits 30-A and B were prepared indicating the accounts receivable still remaining in existence as of the end of that month; was that the practice?

A. That was the practice.

Q. Now, calling your attention to this Exhibit 31-A, was that schedule, or any schedules similar to that, in [323] this Defendant's Exhibits 31-A to 31-AAA, prepared by the bank itself after a document had been signed in blank by Oddo and Rosenthal?

A. None of the schedules appearing in 31-A to 31-BBB were prepared by any officer or employee of Merchandise Bank.

Q. They were all prepared and signed, they were all complete and signed before their delivery to the Merchandise Bank, and no officer or employee of the bank took part in their preparation?

A. That is correct.

Mr. Lasky: They were in the form in which they now appear at the time the bank got them.

The Witness: They were in the form that they now appear when they were presented to the bank by the United Produce Company.

Mr. Lasky: Except, I suppose, for notations about Exhibit numbers which have been added?

The Witness: Or any little pencil notations.

Mr. Lasky: By the way, why not clear up that Exhibit A that appears in the rubber stamp on those papers?

(Deposition of Frederick C. Messenger.)

Mr. Erskine: I am going to do that right now.

Q. (By Mr. Erskine): There is a mark "Exhibit A" on the papers constituting [324] part of Defendant's Exhibits 31-A to 31-BBB. What does that stamp "Exhibit A" on those papers mean, or indicate? Who put it there?

A. The rubber stamp "Exhibit A" indicates that these papers were filed in the Court in the bankruptcy proceedings of the United Produce Company, in the Bankruptcy Court.

Q. Now, Mr. Messenger, endeavoring to abbreviate this matter as much as I possibly can——

Mr. Lasky: For which we thank you profusely!

Q. (By Mr. Erskine, continuing): ——I will call your attention to Defendant's Exhibits for identification 28-A, 28-B and 28-C, and also Defendant's Exhibits for identification 29-A to 29-TT, both inclusive, and I will ask you to state whether or not what you have said with respect to Defendant's Exhibits for identification 30-A, 30-B and 30-C, and Defendant's Exhibits for identification 31-A to and including 31-BBB, is applicable to Defendant's Exhibits 28-A, 28-B and 28-C for identification, and Defendant's Exhibits 29-A through 29-TT, including the identification of the signatures?

Mr. Lasky: Well, now, wait just a moment, please. Will you read that question. I want to be sure I understand [325] it.

(The question was thereupon read by the reporter as above recorded.)

(Deposition of Frederick C. Messenger.)

Mr. Lasky: All right.

A. Defendant's Exhibits for identification 28-A through 28-C, and Defendant's Exhibits for identification 29-A through 29-TT are in the same form, and bear the same signatures, as those appearing in Defendant's Exhibits 30-A through 30-C for identification, and Defendant's Exhibits 31-A through 31-BBB for identification.

Mr. Lasky: Now, just a moment. The question was——

Q. (By Mr. Erskine): In other words, Mr. Messenger, your remarks respecting Defendant's Exhibits for identification 30-A, 30-B and 30-C, and 31-A to and including 31-BBB, are applicable to the other exhibits; is that right?

A. Yes, sir.

Mr. Lasky: And your question includes the fact that they were fully filled out and signed, at the time the bank got them?

Mr. Erskine: That is right.

Mr. Lasky: All right.

Mr. Erskine: That is what I intended. [326]

Mr. Lasky: And the witness' answer to that is "Yes"?

The Witness: Yes.

Mr. Lasky: All right.

Q. (By Mr. Erskine): Now, Mr. Messenger, calling your attention to Defendant's Exhibits for identification 26-A to and including 26-C, and Defendant's Exhibits for identification 27-A, to and including 27-Z, I will ask you if your answer

(Deposition of Frederick C. Messenger.)

is the same with respect to those exhibits as it was with respect to Defendant's Exhibits for identification 28-A, 28-B and 28-C, and 29-A to and including 29-TT?

A. My answer is that they are the same, with——

Q. Your answer is that they are the same, with certain exceptions? A. Yes, sir.

Q. All right. Go ahead.

A. (Continuing): ——with the exception that those last exhibits which you have submitted to me, which are Defendant's Exhibits for identification 26-A through 26-C, and 27-A through 27-Z, bear stamps on their reverse, indicating that they have been filed before Austin Hall, Referee in Bankruptcy, under date of July 14, 1949. [327]

Now, may I ask a question off the record?

Mr. Erskine: Certainly.

(At this point there occurred an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: Is it not enough to say—on the record—that on the back of some of these papers appear filing stamps of the Referee in Bankruptcy? You do not need any more than that, for this case.

Mr. Erskine: No, I am not interested in anything further about that.

Mr. Lasky: Put on in the last few months.

Mr. Erskine: That is right. I am not interested in that.

Q. Now, Mr. Messenger, referring to the De-

(Deposition of Frederick C. Messenger.)

posit Account of the Merchandise National Bank: The statements Defendant's Exhibit 20 for identification show certain items that are marked "CC."

You might take a look at those statements, and would you please tell me what those letters "CC" as appear in the Deposit Account mean?

Mr. Lasky: You are referring to them as a "Deposit Account"?

Mr. Erskine: Statements of the Deposit [328] Account—or, if you prefer another term——

Mr. Lasky: Commercial Account.

Mr. Erskine: All right.

Q. The statements of the United Produce Company Commercial Account show items that are marked "CC" in the credit column.

Will you tell me, please, Mr. Messenger, what those represent, those "CC" items?

A. The items appearing in the deposit column on these statements, Defendant's Exhibits for identification 20-A through 21-E——

Q. Through 21-E, did you say? A. Yes.

Q. Just a moment.

A. Or rather—wait a moment.

Q. I take it you mean 20-A through 20-FFF, do you not?

A. 20-A—yes—through 20-FFF, I meant to say.

Q. Yes.

A. (Continuing): And Defendant's Exhibits for identification 21-A through 21-E represent a posting symbol that is used by our Bookkeeping

(Deposition of Frederick C. Messenger.)

Department, in indicating credits being entered to this account which arose out of loans, or out of drafts discounted for the United Produce Company. [329]

Q. In other words, as I understand it now, Mr. Messenger, when the bank made a loan to the United Produce Company, the Bookkeeping Department of the Bank would enter the amount of the loan in the credit column on the statement of the Commercial Account, and place before the amount, the abbreviation "CC"; is that right?

A. That is true in the case of loans, yes, sir.

Q. And it is also true that when the bank discounted a draft for the United Produce Company, it would place the amount of the discount in the credit column of the statement of the United Produce Company, and place before the amount, the abbreviation "CC," is that correct?

A. In the case of drafts discounted for the United Produce Company, the credit would be entered in the same way, indicating deposits, and the amount would have the initials "CC" indicated thereon.

Q. Now, were those entries in the credit column of the Commercial Account, which you have just described, of two different types, supported by credit memoranda?

A. Yes, sir, they were.

Mr. Erskine: I would like to have you produce all of such credit memoranda, commencing as of July 1st.

(Deposition of Frederick C. Messenger.)

(The witness thereupon produced certain documents.) [330]

Q. (By Mr. Erskine): Do you now have those credit memoranda, Mr. Messenger?

A. The credit memorandums covering the period from July 1st on are here, yes, sir.

Mr. Erskine: I will ask the Reporter to mark these documents as Defendant's Exhibits, beginning with the next Exhibit Number.

Mr. Lasky: Now, just a moment. You want the credit memos to the Commercial Account, covering the "CC" items, do you?

Mr. Erskine: That is right.

Mr. Lasky: Well, all right. It just so happens that there are in there some other credit memos, also.

Mr. Erskine: I would like to have the credit memoranda in support of the entries in the account.

Mr. Lasky: They are not all there; that is, I have taken out two or three slips, for use in another connection.

Mr. Lasky: Yes.

Mr. Erskine: Would you mind putting them back?

Mr. Lasky: No, but I will withdraw them again, of course.

Mr. Erskine: That is all right. Now, the papers which [331] the witness has produced appear to be in five separate groups. I will ask the Reporter

(Deposition of Frederick C. Messenger.)

to mark the credit memoranda for July as Defendant's Exhibits 33-A and the following appropriate numbers; for August, Defendant's Exhibits 34-A and the following numbers; for September, 35-A, and the following numbers; for October, 36-A, and the succeeding numbers; and for November, 37-A, and the following numbers.

(The documents referred to were thereupon marked by the Reporter as Defendant's Exhibits for identification, as follows:

(33-A to 33-MMMM, inclusive.

(34-A to 34-EEEE, inclusive.

(35-A to 35-HHH, inclusive.

(36-A to 36-QQQ, inclusive.

(37-A to 37-MM, inclusive.)

Q. (By Mr. Erskine): Now, Mr. Messenger, I take it that the abbreviation "EC" means the correction of an error, does it not, where it appears on statements of the Commercial Account?

A. "EC" is a designation that is used by our Bookkeeping Department for "Error Corrected."

Q. Now, do you have any memoranda in your files that [332] support those entries?

A. If they happen to be in the deposit column we have them in this group, yes, sir.

Q. When you refer to "This group," I take it you mean the group of credit memoranda which you have before you there; is that correct?

A. Yes, sir; or, if in the check column, then the film, Defendant's Exhibit No. 1 for identification, has pictures of them, a microfilm record of them.

(Deposition of Frederick C. Messenger.)

Q. Now, Mr. Messenger, you have also the abbreviation on the statements of the Commercial Account of "CM." I take it that is a different form of credit memorandum from "CC," and that the papers supporting those entries will be found among the records which you have immediately before you there; is that correct?

A. That is correct.

Q. All right. Now, Mr. Messenger, getting back to this Defendant's Exhibit 23 for identification, with the various letters, 23-A, etc.—it has been mixed up, apparently, in handling, in the micro-filming, and therefore it does not start out here with the number 23-A; but that exhibit, as I recall your testimony in that connection—and again, now, I may be slightly in error, and that is why I am asking you—is your [333] record to the Accounts Receivable assigned to you, and payments made thereon, and other matters which you described here yesterday; is that correct? A. Yes.

Q. Is that right?

A. That is correct, yes, sir.

Q. Now, as you described here the other day, Mr. Messenger, this Exhibit, Defendant's Exhibit 23 for identification, shows in many cases that the withdrawals exceeded the payments, does it not?

A. Yes, sir—that is, the withdrawals of collateral exceeded—

Q. The payments?

A. —the purported payments.

Q. Exceeded the purported payments.

(Deposition of Frederick C. Messenger.)

A. Yes, sir.

Q. Do you have a schedule, or a record, supporting this Exhibit, Defendant's 23 for identification, showing the payments made on account of the Accounts Receivable, and also showing the Accounts Receivable withdrawn for other reasons, and the reasons why such other Accounts Receivable were withdrawn?

Mr. Lasky: Just a moment. May I hear that question again, please, Mr. Reporter? [334]

(The question was thereupon read by the Reporter as above recorded.)

Mr. Lasky: May I ask the relevance of this?

Mr. Erskine: Well, again, we come back to the point I stated a while ago, that all of this examination—or rather, I do not mean to say all of it, but that one of the main points to which this examination with respect to records, is directed, is that the records I believe will show, according to our view, that the Merchandise National Bank either knew or should have known long prior to November 17th that the United Produce Company was engaged in fraudulent transactions, and was using the bank to carry out such fraudulent transactions.

Mr. Lasky: Well, now, wait a moment. This deposition here has been going on, now, for three days, this being the third day, and they have been long days, and we have permitted you, in my own judgment, to wander very far afield.

Now I think that your contention here that the

(Deposition of Frederick C. Messenger.)

bank either knew, or should have known, that it was being defrauded by the United Produce Company, is completely irrelevant in law.

The question now is, how long should this [335] examination be permitted to go forward? In other words, if it is not going to go on forever, I am rather disposed to reserve my objection, and let you go into it.

Mr. Erskine: Well, naturally, Mr. Lasky, I am trying to bring it to a close just as rapidly as I possibly can; but, after all, I have got to get the documents which my auditor tells me are the documents that I require, in order to prove my point.

However, as far as finishing is concerned, I can assure you that I will finish my examination just as promptly as I possibly can.

Mr. Lasky: O.K.; then the witness may produce them for you, but we have all of our objection reserved.

Mr. Erskine: What is the question, please?

Mr. Lasky: You asked the witness to produce certain papers.

Mr. Erskine: To avoid repetition, I would prefer to have the Court Reporter re-read the question.

(The question was thereupon again read by the Reporter as above recorded.)

A. We have a record, which I will secure. Now, covering what period, may I ask?

Mr. Erskine: Commencing as of July 1st. [336]

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Well, now, just a moment. Why do you have to go back to July 1st? I think that this thing is too remote and irrelevant anyway, so why make it more irrelevant and remote by going back to July 1st?

It is only relevant in the last month or so, if you have any point there at all.

Mr. Erskine: I assure you, Mr. Lasky, that we have a point in mind that relates to the general proposition stated a few moments ago. We have utterly no disposition to clutter up this record unnecessarily with exhibits, but we do feel that it is necessary for us to go back to that time.

We are really trying to cut the time down as much as we possibly can.

Mr. Lasky: All right.

(Thereupon certain documents were produced by the witness.)

Mr. Lasky: Now, let us get back to the question again. Will you let me hear the question once again, please, Mr. Reporter?

(The question was thereupon read again by the Reporter as above recorded.)

A. Mr. Erskine, I wish the record to show at this time that I am delivering to you the schedules which [337] you have requested, covering collateral withdrawn, as indicated on Defendant's Exhibits 23-A, and the papers marked with the various letters following, and also the amounts of the pay-

(Deposition of Frederick C. Messenger.)

ments that are likewise indicated on Defendant's Exhibits 23-A for identification, with the various letters.

These records cover the period from July 1st, until November 26th, 1948.

Q. (By Mr. Erskine): You have these papers, as I understand it, separated by months, have you not? A. Yes, sir.

Q. With an elastic around the papers covering each month; is that right? A. Yes, sir.

Mr. Erskine: I will ask the Reporter to mark the papers produced by the witness, covering the month of July, as Defendant's Exhibits 38-A, and the various following numbers; the papers covering the month of August, as Defendant's Exhibit 39-A, and the various succeeding numbers; the papers covering the month of September, as Defendant's Exhibit 40-A, and the numbers following; the papers for the month of October, Defendant's Exhibit 41-A, and the numbers following; and [338] the papers covering the month of November, Defendant's Exhibit 42-A, for identification, and the various numbers following.

(The documents referred to were thereupon marked by the Reporter as Defendant's Exhibits for identification, as follows:

(38-A to 38-HH, inclusive.

(39-A to 39-GG, inclusive.

(40-A to 40-Z, inclusive.

(41-A to 41-CC, inclusive.

(42-A to 42-W, inclusive.)

(Deposition of Frederick C. Messenger.)

Mr. Erskine: Now, I think I have just one or two further questions, and then we will suspend, if that is agreeable.

Mr. Tobey calls my attention, as I understand him, to the fact that these exhibits, Defendant's Exhibits 31-A to and including 31-BBB, for example, show assignments of Accounts Receivable to the Merchandise Bank; but so far as we understand it at the present time, we have no record showing the payments made on account of Accounts Receivable so assigned.

In other words, Mr. Tobey says that as to the papers, for example, marked as Defendant's [339] Exhibits for identification 38-A, and the letters following, the statements of payments and withdrawals on account of Accounts Receivable, the data shown in those papers that I have just mentioned would in the ordinary course of business be posted to some permanent record, and we have not seen the permanent record to which that data would be posted.

Mr. Lasky: Well, Mr. Tobey, of course, is not testifying here.

Mr. Erskine: I understand.

Mr. Lasky: If you have a question to direct to the witness, I suggest that you ask it.

Mr. Erskine: I am asking the witness whether or not he has such a record.

Mr. Lasky: Will you read counsel's statement, Mr. Reporter.

(Deposition of Frederick C. Messenger.)

(The record was thereupon read by the Reporter, as above recorded.)

Mr. Lasky: Well, now, let me say, in the first place, that you do not have any identification in the record of what Defendant's Exhibits for identification 38 to 42, with the accompanying letters are.

Mr. Erskine: I stated that those exhibits, as I understand it, are the memoranda of Accounts Receivable [340] withdrawn, and payments on account of Accounts Receivable.

The question that I am now putting to the witness is whether or not he has any permanent record, based upon such memoranda, showing such payments and such withdrawals.

Mr. Lasky: Well, in the first place, I think that you ought to ask the witness what Defendant's Exhibits for identification 38 to 42, inclusive, are, and not try to tell him what they are.

Q. (By Mr. Erskine): Mr. Messenger, what are Defendant's Exhibits 38-A to 42-A with the following letters, both inclusive?

A. This Exhibit, 38-A, for example, which I have before me, represents the withdrawals, or payments received on collateral; and it also indicates the amount of the payments received on collateral, so withdrawn or paid.

Q. It represents, as I understand it, payments received by the Bank on account of the assignments of Accounts Receivable—on account of Accounts

(Deposition of Frederick C. Messenger.)

Receivable assigned to the Bank, that is, and withdrawals of such Accounts Receivable; is that correct?

A. Yes, sir. [341]

* * *

Q. Who is Mr. Tague?

A. Mr. Tague is an employee of the bank, and he did outside auditing for us.

Q. Is he an officer of the bank?

A. No, he is not.

Q. Who is Mr. Rudolph?

A. Mr. Rudolph is an Assistant Vice-President and was on that date and is directly in charge of the Credit Department.

Q. Is Mr. Tague still in the employ of the bank?

A. Yes, he is.

Q. He was engaged in the business as you have described, in November and October of 1948?

A. That is right.

Q. Mr. Rudolph was an Assistant Vice-President in October and November of 1948?

A. That is right.

Q. And still is an Assistant Vice-President and in the employ of the bank?

A. Yes, sir.

Q. Did you say that Mr. Rudolph was in charge of the Credit Department of the bank?

A. That is right.

Q. Subject, I suppose, to the control and direction and [362] supervision of the Executive Officers, the Vice-Presidents of the bank, the Loaning Officers?

(Deposition of Frederick C. Messenger.)

A. Subject to, rather, I should say, he works in conjunction with the Loaning Officers of the bank.

Q. Mr. Rudolph as the head of the Credit Department of the bank had knowledge of this United Produce Company account?

Mr. Lasky: Just a moment. That calls for a conclusion of this witness to what someone else knew.

Mr. Erskine: All right.

Q. (By Mr. Erskine): Now, I notice on here at the bottom of this sheet, Defendant's Exhibit 44, some handwriting which is dated, apparently, October 2nd. Whose handwriting is that?

A. Mr. LeRoy's handwriting. [363]

* * *

Mr. Erskine: Read it.

Mr. Lasky: Similar in form to what you have there in the left margin. It says:

“Discount Committee action 2-26-48.” Type-writing, “HJR FWR.”

In the body it has the following:

“Discount Committee approved an increase in their Customer's Draft Line to \$200,000. This is in addition to the \$200,000 line on the assignment of all their accounts receivable on which we have as additional collateral \$40,000 in Government Bonds owned by Mr. Rosenthal, and \$8,700 in cash arising out of freight claims. The line is to be reviewed in 90 days.”

(Deposition of Frederick C. Messenger.)

Here is the little memo. I guess that comes within what you are asking for.

Mr. Erskine: Mark that, please, as Defendant's Exhibit 47 for identification. [367]

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 47, for identification.)

Q. (By Mr. Erskine): Now, let me ask you a question about this, Mr. Messenger, while I have it here. I am referring to Defendant's Exhibit 47, which is a memorandum prepared by Mr. Reichwein to Mr. Royds, is that right?

A. That is not correct. This is a memorandum that Mr. Royds prepared and delivered to Mr. Reichwein.

Q. Oh, yes. Who is Mr. Royds?

A. Mr. Royds is an Assistant Vice-President.

Q. Was he at that time and in October and November, 1948?

A. Yes, he was.

Q. And is he still?

A. He still is.

Q. What is his department of the bank?

A. At that particular time he was Manager of our Discount Department, Discount Cage, I might say.

Q. The Discount Cage is the cage at which drafts are discounted, is that right?

A. No, sir. The Discount Cage is where notes are handled.

Q. Now, what do you call the cage at which drafts are [368] discounted?

(Deposition of Frederick C. Messenger.)

A. Those are handled through our collection cage.

Q. Who is in charge of your collection cage?

A. Mr. Koefoot.

Q. That was true in October and November, 1948?

A. That is right.

Mr. Erskine: Are there any other such inter-office communications?

Mr. Lasky: Here is something.

Mr. Erskine: Mark this as Defendant's Exhibit No. 48 for identification.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 48 for identification.)

Q. (By Mr. Erskine): I will show you Exhibit 48. I take it that was prepared by Mr. Reichwein. To what classification does a memorandum of that sort belong? Is it part of your credit file, or is it part of some other credit file?

A. This is a memorandum, that is a part of our credit file—Defendant's Exhibit 48.

Mr. Lasky: What is the date of it?

Mr. Erskine: It is dated 4-7-48.

Are there any other such papers? [369]

Mr. Lasky: Here is a sheaf of seven auditor's reports, apparently monthly.

Mr. Erskine: With respect to United Produce Company?

Mr. Lasky: Yes. You better submit them to the witness and get him to identify them.

(Deposition of Frederick C. Messenger.)

Mr. Erskine: Mark these as Defendant's Exhibits 49-A and following for identification.

(The documents referred to were thereupon marked by the Reporter as Defendant's Exhibits 49-A to 49-G, both inclusive, for identification.)

Q. (By Mr. Erskine): I show the Exhibits 49-A to G, inclusive, and I will ask you to state what those papers are?

A. Defendant's Exhibits 49-A through 49-G represent reports made by Mr. W. E. Tague, one of our auditors, covering the audit and inspection of the books of the United Produce Company on the dates indicated on each one of these reports.

Q. Mr. Tague, you say, was one of your auditors? A. That is correct.

Q. One of his jobs was to make a periodic audit of the books of the United Produce Company?

A. That is correct. [370]

Q. And these papers, Exhibits 49-A to 49-G, disclose the results of his examination, is that right?

A. That is right.

Q. Were there any other reports made by Mr. Tague with respect to his audits of the books of the United Produce Company, other than these sheets I have just mentioned?

A. I know of none other.

Q. Would your knowledge be complete on that? You suggest that there might be some that you might not know of?

(Deposition of Frederick C. Messenger.)

A. The procedure is that those are the type of reports that he would make.

Mr. Lasky: I have in my hand here, taken from the same file, a memorandum by Mr. Tague—it isn't on that form, but I will produce it. I don't know whether it would be called an auditor's report or not.

Q. (By Mr. Erskine): I would like for you to tell me about these initials in the right-hand upper corner of these auditor's reports. I take it that these auditor's reports are submitted to the officers, to each of the officers represented by the separate initials, for his perusal and initialling, is that right?

A. The initials in the upper right-hand corner of these exhibits would indicate that those particular [371] officers had seen these reports and reviewed them.

Q. And that includes Mr. Reichwein, the first initial? A. Mr. Redheffer.

Q. Mr. LeRoy, the second initial, Mr. Reichwein, the third—who is five? A. Mr. Cottle.

Q. Who is six? A. Mr. Royds.

Q. Do you have some other memorandum of Mr. Tague?

Mr. Lasky: Yes.

Mr. Erskine: May I see it?

Mr. Lasky: Yes.

Mr. Erskine: I ask that this be marked as Defendant's Exhibits 50-A and 50-B.

(Deposition of Frederick C. Messenger.)

(The documents referred to were thereupon marked by the Reporter as Defendant's Exhibits Nos. 50-A and 50-B, for identification.)

Q. (By Mr. Erskine): This is a memorandum from Mr. Rudolph to Mr. Tague dated January 26th, 1948, and I take it that that is what it was? (Indicating Defendant's Exhibits 50-A and [372] 50-B.)

* * *

Q. (By Mr. Erskine): Now, Mr. Messenger, calling your attention to Exhibit 40, which is marked 40-A to 40-Z for identification. As I recall your testimony that Exhibit, that group of Exhibits, represents the memoranda upon the basis of which entries were made in the exhibit marked Defendant's Exhibit 23-A to M, inclusive, showing the payment on account of Accounts Receivable Collateral, and the withdrawals of such collateral.

A. Defendant's Exhibits 40-A through 40-Z cover the supporting record in which entries were made in the account as reflected, the record as reflected in Defendant's Exhibits 23-A through 23-M.

As I stated before the first column represented the withdrawal, or collateral eliminated, and the last column represented the purported payments on the collateral that was eliminated by those purported payments.

Q. Did either the entries on these memoranda represent either payments made on account of col-

(Deposition of Frederick C. Messenger.)

lateral eliminated [385] or collateral withdrawn for other purposes?

A. Purported payments on collateral eliminated or collateral withdrawn for other purposes.

Q. For other reasons, I suppose I should say, for other reasons than payment.

A. I don't exactly get your question.

Q. Instead of "for other purposes," I should have said. "Withdrawn for other reasons" than payment. That would be a correct statement, wouldn't it? A. For other——

Q. Collateral withdrawn for other reasons——

Mr. Lasky: I think the testimony is clear enough already.

Q. (By Mr. Erskine): ——than payment.

A. That is correct, yes.

Q. I would like to have you tell me what these initials and writing mean in these various columns. I call your attention to the second column in Exhibit 40-A. What is the writing at the head of that column? What does that mean? What does it say and what does it mean?

Mr. Lasky: That is Gassman's handwriting.

A. That represents the credit of Accounts Receivable as it relates to the collateral account appearing on [386] Exhibits 23-A through 23-M.

Q. (By Mr. Erskine): Credits to accounts receivable, you said, as it appears on the Exhibit you mentioned?

A. Collateral Account, yes. That is the with-

(Deposition of Frederick C. Messenger.)

drawal. That represents the withdrawal of those various items from collateral.

Q. What are the words there?

A. "Credit Accounts Receivable." That is a memorandum or heading that was given to that form by the United Produce Company themselves, because that represents their sheet that they delivered to us.

Q. Oh, I see.

Mr. Lasky: Doesn't that read, "Cr. Accts. Rec."?

The Witness: Oh, yes.

Mr. Lasky: That I would interpret as Credit to Accounts Receivable?

Mr. Erskine: Yes.

Q. (By Mr. Erskine): What is at the top of the column to the right?

A. The heading as indicated as, "D" drafts—"D"—"drafts disc. M.N.B." indicating that the amount appearing in there represents drafts discounted with the Merchandise National Bank, the amount representing the total of the items appearing in that first column, which bears [387] the word, the abbreviations of "Credit Accounts Receivable."

Q. You say it is the total of certain items in the first column?

A. Total of the first two items, one being \$5,195 and the second item being \$808.75. The total of those two items which appear in the column with the abbreviation "Credit to Accounts Receivable"

(Deposition of Frederick C. Messenger.)

equal the \$6,003.75 appearing in the column with the abbreviations are "Drafts Discounted Merchandise National Bank."

Mr. Lasky: Referring now to the face of Exhibit 40-A for identification.

The Witness: That is correct.

Q. (By Mr. Erskine): Still referring to that same paper, why is it that there is not a similar entry made in the column headed "Drafts"?

Mr. Lasky: This is drafts, "D."

Q. (By Mr. Erskine): This is drafts?

A. Discounted.

Q. Drafts discounted. Why is there not a similar entry in that column to this \$6,003.75 with relation to the items appearing in the column to the left below [388] the figure \$808.75?

A. The items appearing in the column with the abbreviation of "Credit Accounts Receivable" below the \$808.75 just previously discussed, those items are items in which we receive purported payments, and the total of those items between \$313.20 and \$1,256.00, total \$31,895.91, which we have an indication in the third column marked "D Notes Payable M.N.W."—there is that total which I have just indicated in that column.

(Indicating.)

Q. "M.N.B."?

A. "M.N.B.," that is, instead of "M.N.W."

That total is \$31,895.91, which is the purported payment which has been posted to the ledger which

(Deposition of Frederick C. Messenger.)

is indicated as Defendant's Exhibits 23-A through 23-M.

Mr. Erskine: Let me see if I understand that.

Q. (By Mr. Erskine): The items which have this total of \$31,895.91 are payments on account of what you call, purported payments of, on account of what you call "Collateral"?

A. That is correct.

Q. Whereas the first two payments in the Credit Accounts Receivable column, \$5,195.00 and \$808.75 are payments on account of drafts, is that [389] right?

A. No, it is not payment on account of drafts. It is a withdrawal of those items from the Accounts Receivable Collateral Account, and that drafts were drawn in those amounts.

Q. It is a withdrawal of Accounts Receivable and drafts withdrawn in those amounts. Do I understand for that the drafts were substituted for the Accounts Receivable? I am just trying to understand it.

A. No, sir; the drafts were not substituted for Accounts Receivable.

We, according to our records appearing on Defendant's Exhibits 23-A through 23-M had excess collateral insofar as the amount of that collateral account over the amount of Notes Payable and they represented a withdrawal of collateral.

Q. Why was it headed "Drafts"? That is the thing I don't understand; drafts discounted. Why did the withdrawal of collateral——

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Maybe I could clarify it.

Mr. Erskine: Go ahead.

Mr. Lasky: Is it a fact, Mr. Messenger, that after some of the excess collateral was withdrawn as collateral for Notes Receivable, Notes Payable to the bank, in some instances that collateral, being invoices, delivery orders [390] and the like, were attached to drafts and drafts discounted with the bank? A. That is correct.

Q. (By Mr. Erskine): That is what that item \$6003.75 represents?

A. That represents those accounts being withdrawn from collateral were drafted by United Produce Company on the——

Q. Purchasers?

A. ——purchasers from them. But, those drafts might have been entered in the, those drafts might have been purchased that day or a previous or subsequent day.

Q. I see. But, at any rate, it means that those accounts were withdrawn and were later, as you expressed it, drafted?

A. Later, or maybe a few days before that.

Q. Either before or after the date of the entry, drafted? A. That is correct.

Q. That draft discounted with the Merchandise National Bank? A. Yes, sir.

Q. Glance over the papers in the group Defendant's Exhibit 40-A and tell me if what you have just said [391] about that 40-A applies to the other papers, will you, Mr. Messenger?

(Deposition of Frederick C. Messenger.)

The Witness: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Q. (By Mr. Lasky): Are you ready?

A. I am ready.

Among the Exhibits 40-A through 40-Z, in answer to your question, all of them are the same type of record, and were used for the same purpose, with the exception of Defendant's Exhibit 40-B, 40-L and 40-Z.

Q. Will you describe those exceptions?

A. Defendant's Exhibit 40-B represents a record of the entry that was put through on September 2, 1948, in which a new loan for the maximum amount of \$200,000, and the schedule of accounts on the books of United Produce Company, were pledged as collateral.

Q. In other words, that was a memoranda upon which entries were made in Defendant's Exhibit 23, on which there was a summing up, the total amount of the debt was shown, and the total face amount of the collateral securing that debt was shown, is that right? [392]

A. That is the entry which——

May I ask the Reporter to read back one statement where I mentioned the \$200,000?

(The answer was thereupon read by the Reporter as above recorded.)

The Witness (Continuing): On that I would

(Deposition of Frederick C. Messenger.)

like to make a change. That represents the posting medium of paying off the note of \$200,000, the loans that were due, and not a new loan.

It also represents the bookkeeping entry covering the withdrawal of all the Accounts Receivable pledged, and which was substituted with a new schedule as of that date.

Q. (By Mr. Erskine): And that, you would call it a posting entry—that was posted in Defendant's Exhibit 23?

A. That was posted on Defendant's Exhibit 23-J the postings appear.

Q. Would you mind telling me about the other exceptions as promptly as you can?

The Witness: Off the record.

(There occurred at this point a further informal discussion, outside the record, which was not recorded by the Reporter.) [393]

The Witness (Continuing): Defendant's Exhibit 40-M, which is stapled to Defendant's Exhibit 40-L, that represents debit memorandums and credit memorandums submitted to us by the United Produce Company to bring the Collateral Account in balance, our record on the Collateral Account in balance with their books.

This happens once or twice a month, but always on the last day of the month.

Defendant's Exhibit 40-Z is the same as Defendant's Exhibit 40-M.

Q. (By Mr. Erskine): With those exceptions,

(Deposition of Frederick C. Messenger.)

Mr. Messenger, I take it that your remarks applicable to the first page in this group of forty are applicable to the other papers in that group?

A. In the review of them it would appear to me that they are applicable, all applicable to the same statement.

Q. Now, I wonder if you would review, as promptly as you can, in the same way, Defendant's Exhibits 38, 39, 41 and 42, that is, those exhibits as groups.

A. I have reviewed Defendant's Exhibits under series Nos. 38, 39, 41 and 42, and in general they are in the same form as that which appeared under Exhibits numbered 40. [394]

I would like to draw your attention to the fact that some of these exhibits in all of these series do not carry three columns of figures with the middle column of drafts discounted M.N.B., do not appear on some of these exhibits.

Q. That is for the reason that no receivables were drafted, to use your expression?

A. That is correct.

Q. In the case of these exhibits?

A. That is right.

Now, there are on Defendant's Exhibit 42-S, there are figures as originally submitted to us that have certain notations entered on them. There is a bracket after three figures indicated in the amount of \$48,726.50, \$39,412.70, and \$17,210.72, with a notation, "Not put through."

Those checks, checks covering those three items

(Deposition of Frederick C. Messenger.)

were received by Merchandise National Bank on November 17th and not put through to any records.

There is an item appearing, \$851.75, with a notation, "This check put through November 18," which was the date in which that entry was consummated on our books.

Q. That last item is on the same page, [395-396] 42-S? A. 42-S.

Defendant's Exhibits 42-U and 42-V cover checks received by the Merchandise National Bank from the United Produce Company and application was made of those amounts in reduction of the Notes Payable Liability to Merchandise National Bank.

Q. And I believe that it appeared, I think it was said by somebody during the discussion of these last exhibits—I better give you the numbers—the group marked 40, 38, 39, 41 and 42, the papers in those groups were prepared by the United Produce Company and filed with the Bank?

A. With the exceptions that I have brought to your attention, all of those were delivered to the Merchandise National Bank in that form.

Q. Yes.

A. In their form with, perhaps, any little notations that might have been put on there by our bank.

Q. In the handwriting of what employee of the United Produce Company do those papers appear, do you know?

(Deposition of Frederick C. Messenger.)

A. I don't know how I should answer that.

Mr. Lasky: Answer if you know.

Q. (By Mr. Erskine): I asked if you knew the handwriting—that is the [397] question.

A. I do not have any knowledge, only hearsay knowledge, as to whose handwriting it is.

Q. All right. But, it is in the handwriting of some employee or officer of the United Produce Company?

A. That is correct.

Q. Now, Mr. Messenger—

Mr. Lasky: If you compare it with the handwriting of Mr. Gassman identified as his own last night, and other documents, you will see that it is in Gassman's handwriting.

Mr. Erskine: I can't say. I don't know.

Q. (By Mr. Erskine): Now, before we proceed to these other exhibits that were marked during the adjournment of these depositions I would like to ask you this: As indicated by the exhibits we just mentioned, 38 to 42, inclusive, those groups, payments were made from time to time on account of the collateral held by the Merchandise National Bank, that is, the assignment of the Accounts Receivable held by it, that is correct, is it not?

A. Purported payments were received by Merchandise National Bank.

Q. Let me see if I am correct in this understanding, [398] and I may not be, but I will state it in order to try to save a little time: In order to determine the source of those payments, that is, the persons making the payments and the method

(Deposition of Frederick C. Messenger.)

by which the payments were made, that is, either cash or checks, and the banks upon which such checks were drawn, it would be necessary, would it not, Mr. Messenger, to examine the blotters and other memoranda in the Collection Department of the Bank, and that such an examination would disclose the source of the payments?

Mr. Lasky: Hold on a moment. Will you read the last question?

(The question of counsel was thereupon read by the Reporter as above recorded.)

Mr. Lasky: O.K.

Q. (By Mr. Erskine): If there is no objection I would like to change that "Collection Department" to "Discount Department," is that right?

A. That is not a complete, true statement.

Q. Will you complete it for me? I want to find out how we can determine the source of those payments in the event we determine, we decide to determine such source. [399]

A. Defendant's Exhibits Nos. 38 through 42 show the names of the persons whose checks were delivered to the Merchandise National Bank, and that is the only record maintained by Merchandise National Bank of the names of persons who were the drawers of the checks presented to us.

Q. Now, can you, by looking at these Exhibits, Defendant's Exhibits 38 through 42, those groups, can you state that the names of the persons appearing in the left-hand column of these sheets,

(Deposition of Frederick C. Messenger.)

can you state that the payments represented on those sheets consisted of checks of the persons named in the left-hand column of those sheets?

A. On Defendant's Exhibits 38 through 42 the names indicated on the left-hand column are the names of the drawers of the checks submitted to us in payment.

Q. Isn't it a fact that those are the names of the debtors of the Accounts Receivable assigned to the bank, and not the names of the drawers of the checks constituting the payments?

A. It is the name of the drawer of the check as well as the name of the Account, that is——

Q. The debtor?

A. ——that is being paid. [400]

Q. Are you prepared to state positively at this time, Mr. Messenger, that all of the Accounts Receivable assigned to the bank during the period covered by these exhibits 38 to 42 were paid by the checks of the debtors whose accounts, whose obligations to the United Produce Company were signed at the Merchandise National Bank?

A. No, sir; I am not in a position to make that statement because we operated on a general assignment basis and we did not stamp off payments against accounts pledged.

Q. And so your previous statement that these sheets, 38-A to 42, would show not only the names of the debtor, but the names of the persons drawing the checks constituting the payments indicated on

(Deposition of Frederick C. Messenger.)

those sheets, is not, to speak with deference, correct?

A. No; the statement that I made that the names appearing on the left-hand column were the names of the drawers of those checks delivered to Merchandise National Bank, and they were indicated as payments of accounts of those same names that were purported to have been pledged to Merchandise National Bank.

Mr. Erskine: It is quite obvious to me that we don't understand one another. Answer this question: [401]

Q. (By Mr. Erskine): Do you or do you not know that the payments shown on Exhibits 38 to 42, inclusive were made by the checks of the debtors whose names appear upon those statements?

A. The names appearing on Schedules 38 through 42 were the names of the drawers of the checks that were presented to Merchandise National Bank, and also that were purported to have paid Accounts Receivables pledged in those same names.

Q. Now, this may be important to us, so I have to pause and try to get the thing straightened out in my own mind. Let us take, for example, the Sheet 38-A. That has on the left-hand column certain names, does it not? A. Yes, it does.

Q. Let us call those, the persons and firms so named, the debtors for convenience—you understand that? That is the term that I will use to refer to those people you understand that, do you?

A. Yes, sir.

(Deposition of Frederick C. Messenger.)

Mr. Lasky: You say the "debtors"?

Mr. Erskine: Debtors.

Mr. Lasky: Why not call them "Account Debtors" to distinguish them from the United Produce Company, which was the debtor of the bank?

Mr. Erskine: All right, we will call them "Account [402] Debtors."

Mr. Lasky: Is that term one that has been used, Account Debtors?

The Witness: That is o.k.

Q. (By Mr. Erskine): And I will ask you this question, then: Are you prepared to state that each of the Accounts of the Debtors indicated on Defendant's Exhibits 38-A drew his own check for the amount of the payment posted to his name in payment of his particular Account and that that check was delivered to the Merchandise Bank?

Mr. Laskey: I object to that, because it assumes something not in evidence. It assumes that the so-called Account Debtor whom the witness has testified drew the checks also had a debt to United Produce Company which had theretofore been pledged to Merchandise National Bank; in other words, for the record, Mr. Erskine, I think the situation as testified to by the witness is clear, if you don't mind my trying to explain it.

Mr. Erskine: Go ahead and explain it. It is not clear to me.

Mr. Lasky: The witness has testified point blank that the checks received by the Bank as

(Deposition of Frederick C. Messenger.)

shown on those sheets are the checks of the persons whose names there appear— [403] correct, Mr. Messenger?

The Witness: Yes.

Mr. Lasky: He has also testified that they purport to be checks of those same people in payment of debts of theirs previously assigned to the bank as collateral—correct?

The Witness: Purported, yes.

Mr. Lasky: He has testified further, as I understand it, whether or not they were from people who had previously, whose accounts had been previously pledged, he doesn't know.

Q. (By Mr. Erskine): Is that right?

A. Yes.

Mr. Erskine: That third point is the one I can't reconcile with the first two.

Mr. Lasky: He has further testified that since they were taking general assignment of receivables they never concerned themselves with the question whether, when a check came into them for the payment of the debt, it did or did not come from somebody whose debt had been pledged with them, they didn't care where the funds came from.

Mr. Erskine: That is the way I understood his testimony. [404]

Q. (By Mr. Erskine): Is that last statement correct? A. That is correct.

Q. That is the way I understood your testimony and that is what occasioned, or gave rise to the confusion in my mind. To repeat as well as I can

(Deposition of Frederick C. Messenger.)

the statement made by Mr. Lasky, the statement last made, my understanding is that when a payment on account of Accounts Receivable came into the bank, that is, Accounts Receivable pledged by United Produce Company to the bank, came into the bank, the bank did not pay any attention to whose check that was, did it?

A. Yes, it did pay attention to whose check it was, it was checked back against these Defendant's Exhibits we are discussing, 38 through 42, but we did not check it back against Schedules of Accounts previously assigned to us.

Q. In other words, when you got Exhibit 38-A, for example, listing six names, you got at the same time checks of those six people in the amounts specified on Exhibit 38-A, and you checked the checks against the names on 38-A and made sure that the checks with the payments indicated on 38-A were made by the checks of those Account Debtors, is that correct? [405]

A. That is correct, if there are six names on that schedule.

Mr. Lasky: May I ask one question at this point?

Mr. Erskine: Yes, that is all right.

Mr. Lasky: Mr. Messenger, when these checks were received were they payable to this bank, or were they payable to the United Produce Company and endorsed to this bank by United Produce Company?

The Witness: They were payable to the United

(Deposition of Frederick C. Messenger.)

Produce Company and endorsed to the Merchandise National Bank.

On Defendant's Exhibit 38-A, in the items we are talking about, there are five names, four names.

Q. (By Mr. Erskine): Four names?

A. These four. (Indicating.)

Q. Oh, I see; four names, the last four are the ones about which we are talking, is that correct?

A. That is correct.

Q. One of these names is, as I read it, La Mantia Brothers.

A. That is La Mantia Brothers.

Q. When this Defendant's Exhibit 38-A was brought into the bank there was brought with it a check of the La Mantia Brothers for \$506.17 payable to the order of [406] the United Produce Company and endorsed by the United Produce Company to the bank, is that right?

A. Without referring to the schedule, if the information you have read off is correct, that is correct.

Q. Just check the information that I have read.

A. "La Mantia Brothers, \$506.17." We did receive such a check.

Q. Can you say that without referring to the schedule? A. Yes, I can.

Q. Your testimony in that respect is the same for the other papers, I take it, and the other items in these papers, 38-A to 42, is that right?

A. It is true with the exception of those exceptions we spoke about in the first place.

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Read the last couple of questions and answers.

(The questions and answers referred to were thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): Now, Mr. Messenger, certain exhibits, credit memoranda, as I understood, were marked yesterday, rather they were marked during the adjournment of this deposition after it was adjourned yesterday, they were marked [407] during the adjournment, and I would like to go over them with you at this time. The groups are marked Defendant's Exhibits 33, 34, 35, 36 and 37.

As I understood what you said yesterday those groups all constitute the credit memoranda upon the basis of which entries were made in the commercial account of the United Produce Company?

A. They represent, Defendant's Exhibits 33, the groups of numbers, 33 to 37, are credit memoranda prepared by Merchandise National Bank, and deposit tickets prepared by the United Produce Company, covering entries in the United Produce Company Account on the books of Merchandise National Bank in the Commercial Bookkeeping Department.

Q. And they are reflected in the Commercial Bookkeeping Department, and they are reflected in the Account which has been introduced in this case, to which we referred as the United Produce Company Commercial Account, is that correct?

A. That is correct.

(Deposition of Frederick C. Messenger.)

Q. So that we can understand these items, we have here an instrument marked 33-A, and up in the left-hand corner there is the word "Credit." Then the first column is entitled "Maker or Endorser," and there are other entries. [408] Will you explain what those entries mean?

A. Defendant's Exhibit 33-A covers a transaction entered on the books of the Merchandise National Bank in the Account of the United Produce Company, Commerical Account, on July 1, 1948. 1948.

It is a form that was prepared in the office of United Produce Company, and is listed thereon three drafts which United Produce Company drew on the "First National source."

After the name "First National source" appears letters and numbers which are, which purport to represent the car in which this merchandise was shipped, and in the column marked "Amount of Item" is listed the amounts of the drafts which were presented to the Merchandise National Bank for discount, and our bank discounted these drafts for United Produce Company on July 1st, and the total was \$6,358.53.

Appearing on this slip is an impression of a rubber stamp "Collection Teller" July 1, 1948.

Q. The collection stamp indicates the date of receipt, does it?

A. It indicates the date of receipt and by whom received; also by whom entries were made.

(Deposition of Frederick C. Messenger.)

Q. Where is the indication of the person making the [409] entries?

A. The impression of the rubber stamp "Collection Teller, July 1, 1948," indicates that it was made in that department.

Q. Let us take the next paper appearing in this group, 33-B. That seems to be a somewhat different form from 38-A. Would you mind explaining that form to me?

A. Defendant's Exhibit 33-B represents a record that was prepared in the Discount Teller's Department on July 1, 1948, and it represents the Acceptance from the United Produce Company of their note which is due on August 6, 1948, in the amount of \$19,747.07, which is to bear the interest rate of 5 per cent and a service fee of 2 per cent, and the collection of such interest and service fee to be on a to-follow basis.

The total credit entry to the account of the United Produce Company in the Commercial Account was \$19,747.07, and was made on July 1, 1948. There is an indication in the lower left-hand corner that it is a new loan, meaning a new note taken. It bears the initials of "H.W.," the teller who made out this ticket.

Q. The line drawn through the little square in the left-hand corner indicates that it is a new loan? [410]

A. A new note.

Q. A new note. And the words "To Follow" mean that the payment of the interest and the service charge are to follow, is that right?

(Deposition of Frederick C. Messenger.)

A. That is correct.

Q. Now, you said that 33-A was made out in the office of the United Produce Company. Is the same thing true of 33-B?

A. One of the first statements that I made in answer to your question that that was a record prepared by an employee of the Merchandise National Bank.

Q. I see.

A. I did not use those words, but that was the intent.

Q. I see. That got by me. Of course, this next item, 33-C, is just a deposit ticket of the United Produce Company indicating a deposit to the account?

A. That is a deposit ticket prepared and delivered to us in its form by United Produce Company with the exception that we have indicated thereon certain memoranda and have impressed our paying teller's stamp.

Q. Going through this group, all marked 33, I came across this paper marked 33-P, and I will ask you to explain that to me, Mr. Messenger.

A. Defendant's Exhibit 33-P is a form prepared in the [411] bank by the collection teller on July 8th, 1948, and it covers an offsetting of a charge we previously had made covering a check which had been previously received by Merchandise National Bank in the amount of \$35,000 from the United Produce Company and was returned unpaid, at which time the \$35,000 plus perhaps pro-

(Deposition of Frederick C. Messenger.)

test fees, if any, were charged against the Commercial Account of United Produce Company.

It indicates that the item had been again handled, and this is the credit on the handling of that item the second time.

Q. In other words, the United Produce Company made a deposit of a check and had been given credit for \$35,000, and the check had been returned unpaid, whereupon you charged its account and then later the check was again presented and paid, and thereupon the bank prepared this 33-P and a credit was entered to the account?

A. I cannot state, without having reference to back records whether or not that was an item that was deposited by the United Produce Company in Merchandise Bank, or whether it was an item that had been received in payment of Accounts Receivable. Without referring back, I cannot answer that question.

Q. Yes. [412]

A. But I can state that it is an item which we had previously credited United Produce Company in one of their operations with us, which was returned unpaid, and it was later again sent us for payment, and that represents the credit.

Q. Do you know whose check that was?

A. From that record, I cannot tell you.

Q. Is there any record from which you can tell?

A. If it was a deposited item we have no way of finding out except by tracing. If it is an ac-

(Deposition of Frederick C. Messenger.)

counts receivable item, we would find it on one of these schedules.

Q. I wonder if you would mind making that tracing and checking the schedule for the purpose of determining whose check that was?

A. That tracing would take anywhere from five days to maybe a month, because it has to be done by correspondence.

Mr. Lasky: Well, of course, we are not going to trace it. We are under no duty to do that, but if he can find it by looking at records the bank has here, it is all right with me to do so.

Q. (By Mr. Erskine): Would you do that, Mr. Messenger? Would you make a note of that? [413]

A. All right.

Q. I would like to show you a paper here marked 33-Z and ask you to describe what that represents.

A. Item 33-Z bears the date of July 10th, 1948, and covers the correction of an entry made on July 8th, whereby a collection of a draft on Feldbaum was advised to us by telephone as one amount, and when we received the Advice we received the advice of a different amount, and this is an adjustment of a \$3.00 error.

Q. Just in closing, I call your attention to No. 33-HHHH. I notice there is a straight line drawn through "New Loan" in the left-hand lower corner, and a cross drawn through "Renewal" in the little box marked "Renewal" to the right of the little box marked "New Loan."

(Deposition of Frederick C. Messenger.)

A. Before I could answer that question I would like to look at another exhibit.

Q. All right.

A. Defendant's Exhibit No. 33-HHHH covers a new loan, which is so marked. The mark under "Renewal" apparently is an error.

Q. Now, in an effort to abbreviate this, as far as I am able, I will ask you, Mr. Messenger, if generally speaking I am not correct in this statement: That with the exception of special memoranda for credits similar to [414] 33-P, all of the papers in this group of exhibits marked 33 are papers similar to 33-A which shows the discounting of certain drafts, or 33-B which shows the execution of a note representing a new loan by the United Produce Company to Merchandise, or 33-C which represents an ordinary deposit ticket?

Would you mind going over that, and also—well, answer that question first for me.

A. In general what you state is correct. The exception is that tickets in the form of 33-P, in the same form as Defendant's Exhibit 33-P, would carry a particular explanation of what that credit was made for.

Q. Yes, but outside of that little statement you have just made, what I said was correct?

A. I think I would like to just take a quick look at them.

Q. Yes. I think you had better look at them.

A. That is correct. [415]

(Deposition of Frederick C. Messenger.)

Q. (By Mr. Erskine): Now, Mr. Messenger, would you tell me what the amount of the Merchandise Bank's capital stock actually paid in and unimpaired plus its unimpaired surplus fund was during the year 1948?

Mr. Lasky: Just a minute. We reserve, of course, our objection to materiality and relevancy, but the witness may answer.

A. The capital stock of the bank issued and outstanding all during the year 1948 was \$1,000,000, and the surplus fund of the bank during that same period was likewise the sum of \$1,000,000.

Q. That was the capital stock not only issued and outstanding, but actually paid in and unimpaired during the year, is that right?

A. From the standpoint of our records it is paid in and unimpaired. [424]

Q. And that was the condition throughout the year and as of December 31st, 1948?

A. That is true.

Q. You mentioned your surplus fund during the year. I take it that was the amount of your surplus fund, namely, \$1,000,000, during the year 1948 and as of the end of the year 1948?

A. That is correct.

Q. Now, if you recall, Mr. Messenger, the other day when we were going over the group of exhibits marked with the number 24 relating to the drafts, you gave certain testimony with respect to the first sheet, or rather the face of the sheet included in

(Deposition of Frederick C. Messenger.)

that group and marked 24-A, and I requested you to make an examination of the other sheets in that exhibit in order to tell me whether or not the statements which you made with respect to the face of the sheet 24-A would apply to the other sheets in the exhibit. I would like to find out if you are prepared to answer that question at this time?

A. I have not had an opportunity to yet check through the rest of the sheets under Exhibit 24.

Q. Will you do so at your first opportunity, Mr. Messenger?

A. Yes, sir. [425]

Mr. Erskine: I hope it will be before I leave Chicago, although I am not prepared to state at this moment the date upon which I will leave.

Q. (By Mr. Erskine): I believe you have answered this before, but I want to make sure, for the sake of the record: The group of Exhibits marked with the figures 24 relates to the drafts discounted by the Merchandise National Bank for the United Produce Company during the year 1948, does it not?

A. It covers the entire year 1948, and several days also in 1947.

Q. With reference to the drafts discounted by your bank for United Produce Company?

A. That is correct.

Q. I will ask you, Mr. Messenger: Those were all drafts which were drawn by the United Produce Company upon drawees, or they purported to be drafts drawn by the United Produce Company upon drawees, and none of such drafts were

(Deposition of Frederick C. Messenger.)

accepted by the drawees thereof before the bank discounted them? A. That is correct. [426]

* * *

Mr. Lasky: All overdrafts in the bank?

Mr. Erskine: The records, the overdraft record, so far as it relates to United Produce Company.

Q. (By Mr. Erskine) Will you do that?

A. We do not have a specific record that relates to United Produce Company. That would be included in a regular report of overdrafts of any kind on any one day.

Mr. Lasky: Without segregation as to individual accounts?

The Witness: Without segregation as to individual accounts.

Q. (By Mr. Erskine): You have a daily report of overdrafts, do you?

A. Yes, we do have.

Mr. Erskine: I would like to see those daily reports of overdrafts, let us say, for the months of October and September, as they relate to the United Produce Company. In other words, I don't want to see those reports as they relate to other customers of the bank, but I would like to see the reports as they relate to the United Produce Company.

Mr. Lasky: Hasn't the witness just said they have no [460] such reports? They have a daily figure of such overdrafts which does not show how it is composed and refers to no names of customers, but is an aggregate.

(Deposition of Frederick C. Messenger.)

The Witness: It is a listing of overdrafts, but we come back to our noon-day overdraft figure, we have the same figure in the noon overdrafts, the same figure appears there which is on Defendant's Exhibit 20. (Indicating.)

Q. (By Mr. Erskine): With respect to those daily reports of overdrafts, those daily reports of overdrafts are submitted, are they not, during the closing hours of each day to the officers of the bank so that the officer in charge of any account appearing thereon can either approve the overdraft and direct its payment, or disapprove it and require the return of the checks creating the overdraft?

A. That is not true. The overdrafts are created after the posting of the books are completed, and there is no determination of returning items, or anything else, made at the time of the presentation of that report. That report is received some hours after the postings are completed.

Q. Who passes upon the question whether or not a check which might create an overdraft shall be paid or rejected? [461]

A. The officer handling that account is submitted that information.

Q. Is what?

A. Is submitted that information.

Q. In other words, when the bookkeeper keeping the records of any account reaches a point where a check creates an overdraft, a charge or check creates an overdraft, the bookkeeper brings the check to the officer of the bank in charge of

(Deposition of Frederick C. Messenger.)

that particular account to find out whether the check is to be paid, is that right?

A. Brings the ledger sheet and the checks.

Q. And the checks. Does the daily report of overdrafts indicate not only the amount of the overdraft, but also the checks creating the overdraft? A. No, it does not.

Mr. Erskine: I would like to see, at least, an illustration of such daily reports so far as they relate to United Produce Company, and I would like to have the witness produce such a report so I can take a look at it.

Mr. Lasky: Do you have some comment to make about that?

The Witness: Let us take a look at one of those reports.

Mr. Lasky: Let us do so. [462]

Mr. Lasky: Mr. Erskine, you asked for a sample of one of the overdrafts reports.

Mr. Erskine: Yes.

Mr. Lasky: I have in my hand one dated February 2nd, 1948, and when it comes down to the overdrafts, there is the heading "Overdrafts," and the date, and "Apprv. by—"

Mr. Erskine: What was that?

Mr. Lasky: I assume that that means "Approved By." Then there is another heading "Overdrafts Covered by Deposits."

The name of the United Produce Company does not appear under "Overdrafts," but it does appear

(Deposition of Frederick C. Messenger.)

in "Overdrafts covered by deposits," and I will read what it shows there:

"United Produce Co.—2/2"—that is the date, February 2; and then under the heading "Approved by" appears the following:

"H.R. - Dis & Coll," which I would assume are the initials of Mr. Reichwein, the "H.R."

The Witness: Mr. Reichwein's initials.

Mr. Lasky: And "Discount and Collection—\$30,948.92."

Now, with that information, Mr. Erskine, I guess you can ask the witness what it all means.

Q. (By Mr. Erskine): Would [463] you tell me, Mr. Messenger?

A. Yes, sir. That overdraft list carries the total of overdrafts as of our noon-day posting.

The overdrafts are divided into two groups; the first group represents overdrafts that were not covered by any deposits at the close of business that day, and they would be true overdrafts.

This with the caption "Overdrafts Covered by Deposits," in which this United Produce Company item of approximately \$30,000 appears, was a noon-day overdraft, which we had received in this particular case, approved by Mr. Reichwein to pay on the basis that there was a credit coming from the Discount Department on new loans; and a credit coming from the Collection Department, on account of drafts discounted.

Mr. Erskine: I take it, in view of the fact that

(Deposition of Frederick C. Messenger.)

people other than the United Produce Company are mentioned on that record which you read, you would prefer that I should not see that record.

Am I correct?

Mr. Lasky: Well, yes, I think that is our position.

Mr. Erskine: All right.

Mr. Lasky: Now, if you wish us to have a typist take this, and just show the captions—— [464]

Mr. Erskine: No. I think you read it into the record, but I am curious to see the form. Do you have a blank form I could see?

The Witness: That is strictly a typewritten record. It is typed on a stencil, and we run the record off that stencil.

Mr. Erskine: You run off copies.

The Witness: Yes.

Mr. Erskine: Well——

The Witness: We could take that document, and run off the captions, we could just have the captions——

Mr. Lasky: Typed up?

The Witness: ——run off, and under the “Overdrafts Covered by Deposits” list that United Produce Company entry.

Mr. Erskine: All right. Would you do that for me?

Mr. Lasky: Why not take that out and have the girl start on it right now?

The Witness: All right. [465]

(Deposition of Frederick C. Messenger.)

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

Mr. Lasky: Now, on the record, Mr. Erskine, let me give you at this time a copy of the Overdraft Report, with the headings, but otherwise blank, except for the item relating to United Produce Company.

Mr. Erskine: Thank you. I will ask the Reporter to mark this paper as Defendant's Exhibit No. 64 for identification.

(The paper referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 64 for identification.)

Mr. Erskine: Now, Mr. Lasky, I would like to discuss with my associates at this point, the advisability of starting with Mr. LeRoy at the present time, at this late hour.

(A short intermission followed.)

Mr. Erskine: I would prefer to suspend at this point, and begin with another witness tomorrow morning. [475]

* * *

Mr. Erskine: Now, Mr. Messenger, I think that I asked you to determine whether or not there were any written rules of the bank with respect to kites.

(Deposition of Frederick C. Messenger.)

The Witness: Yes.

Mr. Erskine: Written rules and regulations, that is.

The Witness: You did.

Mr. Erskine: Are there any such?

The Witness: No, sir, there are no such Operating Instructions.

Mr. Lasky: With respect to what?

The Witness: Kites.

Mr. Erskine: Now I believe that we were going to try to amend the stipulation with respect to the noonday balances, to take into consideration what was done as of the last day of each month.

Has that been done; has that been checked?

Mr. Lasky: Off the record.

(There occurred at this point an informal Discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: If it is agreeable to you gentlemen, I would like to suggest that we suspend at this time, and [497] come back a little earlier; say, at one o'clock this afternoon.

Mr. Lasky: Very well. [498]

* * *

Cross-Examination

By Mr. Lasky:

Q. All right. Hereafter we shall refer to it as Estribou. At the time you phoned to Mr. Estribou, did you have that tape with you?

(Deposition of Frederick C. Messenger.)

A. I did have.

Q. I believe you have testified that in your conversation with Mr. Estribou he called off to you the items of Lofendo checks which had cleared through the Lofendo account, is that correct?

A. I had first suggested that I call off the amounts that I had on my tape, and he suggested that he call off to me the items which they had paid during the month, and I could check them against my record.

Q. And was that done?

A. It was done.

Q. And as he called off the items which he said had been paid through the Lofendo account at East Bakersfield, did you note them?

A. I checked them off along the list.

Q. When you got through checking off all the items he called to you, did you have some items left on your tape which were not checked off?

A. Yes, I did.

Q. How much did they total? [530]

A. Approximately \$600,000.

Q. Did those checks which you still had left on your list come back to the Merchandise Bank thereafter? A. Yes, they did.

Q. Now, I show you here a group of checks marked Defendant's Exhibit 11—well, they were the checks in the Exhibit 11 group marked on your deposition, 11-A, C, E, G, I, K, L, M, N, O, P, Q, R, S, U, W, X, Y, and Z. I show you this group of checks. You have seen these before, have you?

(Deposition of Frederick C. Messenger.)

A. Yes, I have.

Q. Now, had you seen any of those checks on November 17th? A. No, sir, I didn't.

Q. Had any of those checks been in the bank, this bank, the Merchandise Bank, on November 17th? A. No, sir, they had not been.

Mr. Erskine: Pardon me a second. Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Q. (By Mr. Lasky): Do you want to refer to these checks again, Mr. Messenger? [531]

A. Yes. I believe I should change my last answer. I would like to refer to a copy of the wire that was sent to Mr. Dunlap for the amounts——

Q. Well, I show you here the wire, Defendant's Exhibit No. 3 on your deposition.

A. On the group of checks you submitted to me, checks that are marked Defendant's Exhibits 11-A, 11-C and 11-Z——

Mr. Erskine: On whose deposition?

Mr. Lasky: Messenger's.

A. (Continuing): ——on my own deposition——those three checks totalling \$57,000-odd were received by us on November 17th and were in our possession on that date.

Q. (By Mr. Lasky): They were received by you at that time as rejected items, and were returned to you by the United Produce Company?

(Deposition of Frederick C. Messenger.)

A. And were returned to us by the United Produce Company.

Q. Returned to you by who?

A. By the Bank of America.

Q. Now, showing you the other checks in the group, all these I called off a moment ago, but excluding these three, can you say whether or not those checks were the items on that tape which you had not checked off after [532] your conversation, or as a result of your conversation with Mr. Estribou?

A. Yes, they were.

Q. What do they total?

A. Somewhere approximating \$550,000.

Q. Were those checks part of the claim filed by the Merchandise National Bank in the bankruptcy of the United Produce Company?

A. Yes, they were.

Q. Now, by what date, if you can tell me from reference to the records, were all those checks returned to this bank from the East Bakersfield Branch unpaid?

A. (No answer.)

Q. If you wish, you can consult any record here that will help you, if you can tell us what it is. How about the ledger account of the United Produce Company?

A. Yes. That might help. November 26th, 1948.

Q. Did they all come in on that date, or was that the date by which they had all come in?

A. That was the date on which all of them had been received.

Q. After they were received in this bank, Mer-

(Deposition of Frederick C. Messenger.)

chandise Bank, what was done with respect to them?

A. They were charged back against the United Produce [533] Company commercial account, and the checks themselves retained in the possession of the bank.

Q. If they had been charged off before November 15th, 1948, would there have been or would there not have been any apparent credit balance as of that date in the Commercial Account of United Produce Company, which I believe is Exhibit 2?

Mr. Erskine: Just a minute. I object to that question as hypothetical and calling for his conclusion. I think the form of it therefore is improper.

Q. (By Mr. Lasky): Will you answer the question, please, Mr. Messenger?

A. If all of the checks had been returned by November 15th, 1948, there would have been a very large overdraft appearing on the commercial account of the United Produce Company.

Mr. Erskine: Those are the checks in the group of exhibits marked No. 11 on the taking of your deposition?

The Witness: Yes.

Mr. Lasky: Yes.

Q. (By Mr. Lasky): If they had been charged off on or before the 15th, would there have been any apparent credit balance against [534] which to charge the six checks we have talked about approximating \$113,000-odd?

(Deposition of Frederick C. Messenger.)

A. There would not have been any balance whatsoever available for the payment of those items.

Q. May I see those checks, please?

A. Yes.

Q. If no credit had been passed on the basis of these checks we just referred to in the Exhibit 11 group, would there have been any credit balance in the commercial ledger account of the United Produce Company on November 15th?

Mr. Erskine: Now, of course, I have the same objection to this line of questions. It is hypothetical. The form does not strike me as being correct, and certainly they are incompetent, irrelevant, and immaterial, in addition.

Q. (By Mr. Lasky): Answer the question, please.

A. May I have the question repeated?

Mr. Lasky: Yes. Will you read him the question, please, Mr. Reporter.

(The question of counsel was thereupon read as above recorded.)

A. There would have been no balance in the account. [535]

* * *

Q. (By Mr. Lasky): Would there have been any apparent balance against which to charge the six checks aggregating \$113,000, about which we have been talking?

A. No; there would not have been any balance.

(Deposition of Frederick C. Messenger.)

Q. Do you have, or can you produce, the debit tickets for the charge-off of these checks in that Exhibit 11 group that we have been referring to?

A. Yes. I do have—we do have copies of those charges.

Q. Do you have them here?

A. Just a minute.

Mr. Lasky: This is on the record. These same checks have been reproduced photostatically in the bankruptcy claim, and I would like a stipulation that the photostatic copies as they appear in the bankruptcy claim may, for all purposes of this case, be used in lieu of the original checks if that becomes necessary.

Mr. Erskine: That is, the checks in the Exhibit 11 group?

Mr. Lasky: Yes.

Mr. Erskine: In the Messenger Deposition?

Mr. Lasky: Yes.

Mr. Erskine: I will stipulate, subject to correction. I do not know that they are all [536] included.

Mr. Lasky: Well, all these stipulations are, of course, subject to the right of any party to request, at the trial, all originals.

Mr. Erskine: And according to your understanding all of the checks in that group 11 are included as Exhibits on the bankruptcy claim?

Mr. Lasky: Yes.

Mr. Erskine: All right. I will stipulate that those exhibits to the bankruptcy claim may be used

(Deposition of Frederick C. Messenger.)

in lieu of the originals, subject to the reservation you just mentioned.

Mr. Lasky: The only reason I bring that up is that there may be other litigation in Chicago for which we may have occasion to need the originals.

Mr. Erskine: That is all right. Haven't they been photostated?

Mr. Lasky: I believe they have been microfilmed, have they not?

Mr. Erskine: Yes.

Mr. Lasky: All right. We have it that way, too.

The Witness: I do not find all of those tickets here.

Mr. Lasky: Make a note of that so we will have them available tomorrow. [537]

* * *

By Mr. Lasky:

Q. Mr. Messenger, will you please take Defendant's Exhibits Nos. 21-A to 21-E, both inclusive, for identification, and point out the items thereon wherein the checks which came back from the Bank of America, which we referred to in our testimony of yesterday, and which are a part of the Defendant's Exhibit No. 11 for identification group, were charged off? A. I think, if I had——

Q. Do you want the Exhibit 11 group?

A. Yes, sir; then I would be definitely correct in my answer.

Mr. Lasky: All right. We will get those.

(Deposition of Frederick C. Messenger.)

(The documents referred to were handed to the witness.)

A. On Defendant's Exhibit 21-C for identification, under date of November 17th, 1948, two items were charged off; one being in the amount of \$31,912.12, and the other, in the amount of [541] \$17,290.85.

On Defendant's Exhibit 21-D, for identification, under date of November 22nd——

Q. Now, hold on just a moment. A. Yes.

Q. Well, never mind; go ahead; but as you go through there, Mr. Messenger, can you point out what sheets of Defendant's Exhibit 11—that group—your charge-off relates to?

Mr. Erskine: Could we cover this by stipulation, and save time?

Mr. Lasky: He has the documents in front of him now, and I think he can give it to us faster than we could work out a stipulation.

Mr. Erskine: All right.

A. (Continuing): Under date of November 17th, Defendant's Exhibit No. 11-C for identification——

Mr. Lasky: Incidentally, these are all Messenger Exhibits.

A. (Continuing): ——in the amount of——

Mr. Erskine: In the amount of what?

A. There was—I mean, was charged, in the amount of \$31,912.12. Protest fees were added to the original amount of the check.

(Deposition of Frederick C. Messenger.)

Defendant's Exhibit 11-A for identification [542] was likewise charged on that date, in the amount of \$17,290.85.

Under date of November 22nd, Defendant's Exhibit 11-O for identification was charged, in the amount of \$4,407.85.

Defendant's Exhibit 11-M for identification was charged in the amount of \$31,755.56.

Q. (By Mr. Lasky): When you say they were "charged," are you referring to a charge-off, or a charge-back? A. They were charged back.

Mr. Erskine: By a D. M.?

The Witness: By a Debit Memorandum, yes.

Mr. Erskine: All of them were charged back by a debit memorandum.

The Witness: Yes.

Mr. Erskine: All right.

A. (Continuing): Defendant's Exhibit 11-Q was charged in the amount of \$31,258.66.

Defendant's Exhibit 11-R for identification was charged in the amount of \$38,682.27.

Defendant's Exhibit 11-K for identification was charged in the amount of \$28,385.05.

Defendant's Exhibit 11-L for identification was charged [543] in the amount of \$25,819.49.

Defendant's Exhibit 11-N for identification was charged in the amount of \$38,044.91.

Defendant's Exhibit 11-W for identification was charged in the amount of \$25,316.35.

Defendant's Exhibit 11-V for identification was charged in the amount of \$35,807.43.

(Deposition of Frederick C. Messenger.)

Defendant's Exhibit 11-X for identification was charged in the amount of \$29,652.91.

Defendant's Exhibit 11-I for identification was charged in the amount of \$38,745.03.

Q. (By Mr. Lasky): Including in that, a protest fee of \$4.00? A. Yes, sir.

Q. Yes.

A. Defendant's Exhibit 11-E for identification was charged off in the amount of \$34,993.74, which included a protest charge of \$4.00.

Defendant's Exhibit 11-P for identification was charged off in the amount of \$39,333.51.

Defendant's Exhibit 11-S for identification was charged on November 26th, in the amount of \$27,-846.65.

Q. Including a protest fee of \$4.00?

A. Including a protest fee of \$4.00, yes, [544] sir.

Q. And that charge-off occurs on Defendant's Exhibit 21-E for identification? A. Yes.

Mr. Lasky: If you do not mind my leading the witness.

Mr. Erskine: Not a bit; go just as far as you want.

A. (Continuing): Under the same date, Defendant's Exhibit 11-U for identification was charged, in the amount of \$28,329.50, which included a \$4.00 protest fee.

Q. (By Mr. Lasky): Also on Defendant's Exhibit 21-E for identification? A. Yes, sir.

Q. Yes?

(Deposition of Frederick C. Messenger.)

A. On Defendant's Exhibit 21-C for identification, Defendant's Exhibit 11-Z for identification was charged, in the amount of \$8,504, including a \$4.00 protest fee.

Q. Under date of November 17th?

A. Under date of November 17th, 1948. On Defendant's Exhibit 21-D for identification, Defendant's Exhibit 11-G was charged, in the amount of \$36,527.52, which included \$4.00 of protest fees, and \$1.25 in wire charges.

Q. Now, were those charge-backs made on each item, as the checks were returned by the Bank of America, and arrived here at the Merchandise National Bank? [545]

A. Yes, they were.

Q. Did the Merchandise National Bank receive from the East Bakersfield Branch of the Bank of America, or from the head office, wires concerning the rejection of those items prior to the receipt of the returned checks here in Chicago?

A. There were several wires received, regarding the rejection of those checks.

Q. Will you produce those wires, please.

A. Yes, sir.

(Certain documents were produced by the witness.)

Mr. Lasky: Here are a number of wires which have been produced by the witness. Mr. Reporter, will you please mark them as Plaintiff's Exhibits 1-A, 1-B and 1-C respectively for identification, on Mr. Messenger's Deposition.

(Deposition of Frederick C. Messenger.)

(The documents referred to were thereupon marked by the Reporter as Plaintiff's Exhibits Nos. 1-A, 1-B, and 1-C, both inclusive, for identification.)

Mr. Lasky: Now again, Mr. Erskine, with your permission, I will lead the witness on these documents, and documents of this character. [546]

Mr. Erskine: Yes, surely; go right ahead.

Q. (By Mr. Lasky): Plaintiff's Exhibits 1-A, 1-B and 1-C for identification, just marked by the Reporter, are the wires received by this bank from the Bank of America, to which you have just referred, are they not, Mr. Messenger?

A. Yes, sir.

Q. They are the original wires?

A. Yes, sir.

Q. Plaintiff's Exhibit 1-A for identification was received here on November 18th, was it?

A. Yes, sir.

Q. In handwriting, underneath the text of the wire, which is in code, appears a translation of it?

A. Yes, sir.

Q. Is that the decodification of that wire?

A. Yes, sir.

Q. Plaintiff's Exhibit 1-B for identification is another original wire received at the bank here from the Bank of America? A. Yes, sir.

Q. And that was received here on November 19, 1948? A. Yes, sir.

Q. Plaintiff's Exhibit 1-C is another original

(Deposition of Frederick C. Messenger.)

wire [547] received by this bank from the Bank of America; is that correct? A. Yes, sir.

Q. Received here in Chicago by the Merchandise National Bank on November 20th, 1948?

A. I can answer that this was received here. I am not definitely certain, however, whether we received it on that day, or the next business day.

Mr. Lasky: I see.

Mr. Erskine: May I see those wires, please, Mr. Lasky?

Mr. Lasky: In just a moment, if I may.

Q. (By Mr. Lasky): Underneath the typewritten text of Plaintiff's Exhibit 1-C for identification, there appears in pencil handwriting a corrected decodification of that wire; is that correct?

A. On Plaintiff's Exhibit 1-C for identification, there is a difference in the amount, from which it would appear that that one was not properly decoded at the time it was received.

Otherwise, the decoding would be correct.

Mr. Lasky: Now, you want to see these, do you?

Mr. Erskine: Yes.

Mr. Lasky: While counsel is looking at those wires, [548] Mr. Reporter, here is a group of documents which I will ask you to mark as Plaintiff's Exhibits 2-A, 2-B, and so on, for identification.

(The documents were thereupon marked by the Reporter as Plaintiff's Exhibits Nos. 2-A, to 2-S, both inclusive, for identification.)

(Deposition of Frederick C. Messenger.)

Mr. Lasky: With your permission, Mr. Erskine, I will also lead the witness on these documents.

Mr. Erskine: Certainly.

Q. (By Mr. Lasky): I show you here, Mr. Messenger, a group of papers which have just been marked by the Reporter as Plaintiff's Exhibits 2-A to 2-S, both inclusive, for identification.

Are these the debit memos which were made up in the Merchandise National Bank, and on the basis of which the charge-backs to which you have just referred in your testimony, in Defendant's Exhibit 21, the 21 group, were made?

A. Yes, sir, they are. [549]

* * *

A. I used the remittance sheets, as you referred to, Defendant's Exhibit 39-A, and sheets appearing in the same form——

Q. And heretofore marked for identification?

A. And heretofore marked for identification—and I used the photostatic copy of the account of Frank C. Lofendo with the East Bakersfield Branch of the Bank of America.

Q. Hold on a minute. Let's get that. Has that been marked in here? It has not, has it?

Mr. Tobey: No.

Mr. Laskey: All right. Let's get that.

Mr. Erskine: Will you read the question to me, please Mr. Reporter?

(The question was read by the Reporter as above recorded.)

(Deposition of Frederick C. Messenger.)

Mr. Lasky: By "discount" department, I mean the Loan Department.

Q. (By Mr. Lasky): It is all one and the same, is it not? A. Yes.

Q. You just referred to a document, the photostat of the ledger account of Frank C. Lofendo at the East Bakersfield [585] Branch of the Bank of America? A. Yes.

Q. Is that this series of sheets marked Exhibit No. 2 for identification on the Estribou Deposition?

A. Yes, sir.

Mr. Lasky: I will ask that these photostatic copies be marked as Plaintiff's Exhibit 4 on this Deposition.

(The documents referred to were thereupon marked by the Reporter as Plaintiff's Exhibits Nos. 4-A to 4-H, both inclusive, for identification.)

Mr. Lasky: I do not see any point in re-photostating those.

Mr. Erskine: No.

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

Q. (By Mr. Lasky): We interrupted you, Mr. Witness. What other documents, if any, did you use besides these two?

A. The document that has been generally referred to as the Gassman memorandum.

(Deposition of Frederick C. Messenger.)

Mr. Erskine: I did not understand that. [586]

Q. (By Mr. Lasky): By "Gassman Memorandum," do you refer to the document marked on the taking of Mr. Gassman's Deposition as Plaintiff's Exhibits Nos. 16-A to 16-X? A. I do.

Q. And did you refer to any other documents?

A. I also referred to the Deposit Tickets which have been introduced as Exhibits——

Q. You mean marked as Exhibits?

A. Marked as Exhibits——

Q. You mean the documents marked as Defendant's Exhibit 36 group, 37 group, 35 group, 33 group and 34 group? A. That is correct.

Q. Did you find that there were any checks drawn on the Lofendo Account at the East Bakersfield Branch which came into the Merchandise Bank, into the Loan Department, other than such as are listed expressly by name and amount on the so-called daily remittance sheets?

A. No, sir; I did not find any other items.

Q. Were there any others? A. No, sir.

Q. Mr. Messenger, as the so-called daily remittance [587] checks came in from United Produce Company to this bank, Merchandise National Bank, were they the basis of new loans?

A. No, sir; they were not the basis of new loans. They created, by their acceptance and use as a payment—a purported payment on the loans of United Produce Company—they created an area in which additional loans could be granted, and new loans granted were granted on the basis of new collateral.

(Deposition of Frederick C. Messenger.)

Q. You have referred to an area of credit within some limits. Within what limits?

A. The area of credit is the amount in which the loan was less than the \$200,000 limit established for that line.

Q. Established by whom?

A. By the Discount Committee of the Board of Directors.

Q. I believe that on your direct examination you were asked what float is. What is float?

A. Float represents checks accepted, and which are not considered—let me start that answer over again.

Float represents the amount involved in a check or checks until their ultimate payment. The bank has no use of those funds until payment is actually made.

* * *

[Endorsed]: Filed June 7, 1950. [588]

DEPOSITION OF WILLIAM F. COLLINS

* * *

Mr. Moses: I would like to have the record show that this deposition is being taken upon notice, duly served upon the attorneys of record in the proceeding in the District Court of the United States for the Northern District of California, Southern Division.

I would also like to have the Reporter attach the notice to the deposition.

(Deposition of William F. Collins.)

(Said notice was thereupon filed with the Notary Public, and the same is attached hereto and returned herewith.)

Mr. Moses: Will you swear the witness, please, Mr. Reporter?

Thereupon:

WILLIAM F. COLLINS

called as a witness by the Defendant in the above-entitled cause, having been first duly sworn, was examined upon oral interrogatories and deposed and said as follows:

Direct Examination

By Mr. Moses:

Q. Mr. Collins, I will ask you to state your full name to the Reporter. A. William F. Collins.

Q. What business are you engaged in?

A. Banking.

Q. What bank, please?

A. Lincoln National Bank, Chicago.

Q. What position do you hold?

A. At the present time, I am President.

Q. Where is your bank located?

A. Irving Park Road and Lincoln Avenue.

Q. Now, Mr. Collins, you were subpoenaed to appear for the taking of this deposition, were you not? A. I was.

Q. Who served you? A. You did.

Q. When? A. On the 24th of May.

Q. At ten o'clock in the morning?

(Deposition of William F. Collins.)

A. At approximately ten o'clock in the morning, yes, sir.

Mr. Moses: I would like at this time to file with the Notary, the original subpoena, a copy of which was served upon Mr. Collins, and have it attached to the deposition.

(Said subpoena was thereupon filed with the Notary [4*] Public, and the same is attached hereto and returned herewith.)

Q. (By Mr. Moses): Mr. Collins, were you at any time in the employ of the Merchandise National Bank of Chicago? A. I was.

Q. During what period of time?

A. From about the first of December, 1934, until the 31st of October, 1948.

Q. And what was your position when you left the bank in October of 1948?

A. I was Cashier.

Q. As Cashier of the Bank, what were your duties?

A. I was the Operating Officer of the bank.

Q. Did you have anything to do with the extension of loans to customers of the bank?

A. No, I did not.

Q. Did you have anything to do with any credit?

A. No.

Q. As a matter of fact, your duties included mostly personnel work in the bank; is that correct?

A. Yes, sir—that, and the internal operation of the bank. [5]

(Deposition of William F. Collins.)

Q. Mr. Collins, during the second half of 1948, was your attention called to the account of the United Produce Company? A. Yes, sir.

Mr. Moses: Mr. Reporter, will you please mark this document as Defendant's Exhibit No. 1, Collins, for identification.

(Said document was thereupon marked by the Notary Public, as Defendant's Exhibit to this Deposition No. 1 Collins, for identification; and a photostatic copy of the same is attached hereto and returned herewith.)

Q. (By Mr. Moses): Mr. Collins, I show you here what has been marked by the Reporter as Defendant's Exhibit No. 1, Witness Collins, for identification, and will ask you if you recall having seen this check before?

A. Yes, sir, I am quite certain that I did.

Q. And when was that, do you recall?

A. It was in the latter part of September, 1948.

Q. And what were the circumstances under which you saw that check? [6]

A. As I remember it now, I received a report from one of the tellers in the bank, who handled returned checks, that a fairly large item had been returned unpaid, against the account of the United Produce Company, which was the endorser.

We had a system in the bank whereby, on notice, or upon actual return, whichever came first, of larger items, the facts of the case were reported to me, so that we could govern the handling of the re-

(Deposition of William F. Collins.)

turned checks accordingly, and know as soon as possible what we might be dealing with.

Q. Can you fix the date when the check was shown to you? Can you tell, by examining the check?

A. Probably within a day or two of time, but I would hesitate to attempt to fix that actual date.

However, I would say that it was somewhere around, or approaching, the 22nd or 23rd of the month.

Q. Of September? A. Yes, sir.

Q. 1948?

A. Yes, sir. It may have been later. Some of these dates are pretty hard to read.

Q. Well, it was the latter part of September, at least. [7]

A. It was the latter part of September, yes, sir.

Q. Now, when you had that check called to your attention. what did you do?

A. As I recall it now, I first inquired of the Return Teller whether or not he had placed a "Hold" against the account of the United Produce Company, to provide for charging the account back with the item; and also as to whether it had been shown to any of the other officers of the bank who may have been handling the credits of the United Produce Company.

I cannot state the exact answer that I received, but I am quite sure that I did determine to my own satisfaction that funds were on our books to

(Deposition of William F. Collins.)

allow the charge-back of the check, so that it could be retired.

Q. Did you talk to any other officers of the bank about this check that had been returned unpaid? A. Yes, I did follow it up.

Q. Who did you talk to?

A. I talked to Mr. LeRoy.

Q. Was Mr. Reichwein there at that time?

A. No, sir. If I remember correctly, he was on his [8] vacation at that time.

Q. Mr. Reichwein was the officer in charge of this account of the United Produce Company; is that correct?

A. More or less, yes; the account was assigned to him although in his absence, of course, the account would be temporarily serviced by one of the other men.

Q. Which other man would that be?

A. I am pretty sure that Mr. LeRoy was handling it temporarily, in Mr. Reichwein's absence.

Q. Then what did you do? Did you call for a statement of the account, and examine it, before you talked to Mr. LeRoy about it?

A. No, sir, I do not recall that I did exactly that. I showed it to Mr. LeRoy.

Q. You showed the check to Mr. LeRoy?

A. I showed the check to Mr. LeRoy, yes, sir.

Q. Yes?

A. (Continuing): And raised a question as to the size of a returned item like that, and suggested that we might look into the account, just to determine its status.

(Deposition of William F. Collins.)

Q. And what did Mr. LeRoy say?

A. He agreed with me; and after some little time, [9] although I would hesitate to say how many days, the Credit Department, not having had the time to delve into the account, and trace the deposits, and the flow of checks, and so forth, Mr. LeRoy finally asked me if I would make a rather cursory examination of the figures in the account, which I did.

Q. And what did you find, when you made that examination?

A. I found that, in my opinion, they were drawing very heavily against uncollected funds, at least, and that, added to the interchange of checks between the United Produce Company and others, possibly the thing went beyond that, although at that time that was just a possibility.

Q. Did the account disclose the fact that they had been drawing heavily against uncollected funds? A. Yes, it did.

Q. And that was not merely a matter of your opinion, was it? A. No, sir.

Q. That was a matter of account, a matter of record?

A. That much of it was factual, yes, sir.

Q. That was factual? A. Yes, sir. [10]

Q. Now, did you notice, in your examination of this account, any similarity between the debit and credit sides, as to amounts?

A. Yes, sir, I did—at least, it impressed me that way.

(Deposition of William F. Collins.)

Q. And what opinion, if any, did you form as to the effect of that?

A. I felt that there was a fair possibility that they were kiting checks.

Q. Well, after you made your examination of this account, did you then talk to Mr. LeRoy further about it?

A. Yes, sir, I did.

Q. And what did you tell Mr. LeRoy?

A. I told Mr. LeRoy of my personal opinion; and I also showed him quite a number of transactions, both debits and credits, to support the feeling that I had.

Q. What feeling was that?

A. That there was a possibility of kiting, there was a good possibility of kiting; and also that, at the very least, they were drawing heavily against uncollected funds.

Q. What, if anything, did Mr. LeRoy say?

A. Mr. LeRoy responded, after going over the entries [11] with me, by—I cannot quote his exact language, but he told me that he fairly well agreed with me, and felt that we should take the matter up with Mr. Redheffer.

Q. Did you then take the matter up with Mr. Redheffer?

A. Yes, sir, we did.

Q. Both of you?

A. Both of us.

Q. Immediately?

A. Immediately.

Q. And what conversation took place between Mr. Redheffer, Mr. LeRoy and yourself with respect to the account at that time?

A. Mr. LeRoy and I voiced our opinions, and

(Deposition of William F. Collins.)

told Mr. Redheffer those things that we had seen in the account, or felt that we had seen in the account; and Mr. LeRoy pretty well suggested to Mr. Redheffer that a more thorough examination be entered into, in regard to the United Produce Company's dealings with us.

Q. Did you tell Mr. Redheffer that, in your opinion, there was a possibility of check kiting in this account?

A. Yes, sir, that was firmly made.

Q. And did Mr. Redheffer then suggest that there be [12] an investigation of this account?

A. Yes; he concurred.

Q. And was such an investigation made?

A. I am quite sure that there was—as a matter of fact, I am positive that there was, yes, sir.

Q. Did you have anything further to do with the matter, beyond the conference there that you had with Mr. LeRoy and Mr. Redheffer?

A. No.

Q. Subsequent to that?

A. No, I did not. The matter was taken over by the Credit Department, the Loaning Officers, and by Mr. Redheffer.

Q. And beyond the conference with Mr. Redheffer and Mr. LeRoy, you did not follow the matter up after that?

A. No, sir.

Q. Do you know whether or not an investigation was made?

A. Yes, I am quite sure that an investigation was made by the Credit Department.

(Deposition of William F. Collins.)

Q. Do you know who the individual was, who made that investigation?

A. Yes; I remember that Mr. Tague was the accountant who went over and examined their books, and obtained [13] an explanation from them of the exchange of checks between themselves and others.

Q. Your recollection is, then, that all of the conversations that you have testified to, both with Mr. LeRoy and Mr. Redheffer, were in the latter part of September of 1948; is that right? A. Yes.

Q. And those conversations took place in the bank? A. In the bank.

Q. Did you talk to any other officer of the bank about this account?

A. Oh, I am quite sure that I did, Mr. Moses, yes. A thing like that was almost bound to be a matter of somewhat general discussion among the officers who would be working in any manner on the account, or servicing it in any manner.

I know that at the time that it was first drawn to Mr. Redheffer's attention by Mr. LeRoy and myself, he immediately called Mr. Rudolph in, and I think Mr. Royds, and there was a general discussion about their drawing against uncollected funds, and about the exchange of checks, and so forth, and so on.

That much of it was generally discussed [14] among at least those officers.

Q. Was there any discussion with respect to the

(Deposition of William F. Collins.)

similarity of amounts of debits and credits, when uncollected funds were drawn against?

A. I would hesitate to say that there was a pointed discussion with reference to that; but the exchange of checks, of course, was discussed, because that was one of the purposes of the further investigation which was being made by Mr. Tague.

Q. When you left the Merchandise National Bank, Mr. Collins, what place did you then go to?

A. I went first to the Upper Avenue National Bank, Chicago.

Q. What position did you hold there?

A. Cashier.

Q. What was your relationship with the Merchandise National Bank at the time you left, in regard to being a friendly or an unfriendly relationship?

A. Oh, it was perfectly friendly. I withdrew from the Merchandise National Bank voluntarily, for purely private reasons. [15]

* * *

Cross-Examination

By Mr. Riordan:

Q. Did your operations and your responsibilities at the Merchandise National Bank acquaint you with the practice of that bank in connection with the handling of items drawn against uncollected funds? A. Yes, sir.

Q. Given a situation such as you say your investigation at that time revealed in the account of

(Deposition of William F. Collins.)

the United Produce Company, where checks were drawn against uncollected funds, what was the procedure within the bank in that connection?

A. What was the procedure and policy of the bank at that time?

Q. Yes, at that time?

A. With this particular customer, or with all customers in general?

Q. With customers in general.

A. The practice was to deal with each customer on an individual basis. In some cases we would allow— [33] that is, we did allow, the bank did allow, customers to draw against uncollected funds, and in some cases, it forbade it.

Q. And whether that was allowed, or not, was a matter of the exercise of judgment?

A. Yes, sir.

Q. By whom?

A. By any one of several officers. It might have been Mr. Redheffer, the President; it might have been Mr. Cottle, a Vice-President; it might have been Mr. Reichwein, a Vice-President; it might have been Mr. LeRoy, a Vice-President; on some occasions, on the more normal or ordinary accounts, it might have been upon my judgment; and in other lesser cases, it might have been upon the judgment of one or another of the junior officers.

Q. In other words, it rested within the discretion of an officer——

A. Yes.

Q. (Continuing): ——as to whether checks

(Deposition of William F. Collins.)

drawn against uncollected funds would be honored, or otherwise? A. Yes.

Q. And is that standard practice at most banks, to [34] your knowledge?

A. In essence, yes. [35]

* * *

Q. Mr. Collins, do you have any view to express concerning a difference in the position of the bank with respect to uncollected items, as against the position of the bank in a straight extension of credit to a customer of the bank?

A. Yes; I think that you are dealing there with two entirely different things. Even though the result of your handling may have much the appearance of being identical, my personal opinion would be that you are [41] traveling two completely different roads.

Q. By "two completely different roads," you mean, do you, that, as a last resort, you have the benefit, that is, the bank has the benefit, of the credit capacity of the party drawing the check or checks which make up the uncollected items?

A. You place a portion of your reliance on the liquidation of the money that you have advanced, upon the payment of checks by the maker upon their presentation.

Q. Ability to pay, that is? A. Yes.

Q. The maker's ability to pay?

A. Yes, sir, and also the willingness to pay, of course.

(Deposition of William F. Collins.)

Q. So that your position, on the basis of the testimony which you have just given, is not that, in permitting withdrawals against uncollected items, the operation is identical with that of a loan to a depositor?

A. No, it is not identical. [42]

* * *

Q. Mr. Collins, what has been your experience, while at the Merchandise National Bank, concerning the occasions, [44] speaking in terms of relation to the aggregate, of the dishonored or uncollected items?

In other words, where withdrawals have been permitted against uncollected items, what has been the experience of the Merchandise National Bank, within your knowledge? Were there many, or few of such items dishonored?

A. Speaking of that bank only, there were relatively few dishonored.

* * *

Mr. Riordan: Now, back on the record.

Q. You understood, did you not, Mr. Collins, that my [45] question was directed to your experience with respect to depositors' transactions throughout the bank, as a whole? A. Yes.

Q. Its operations as a whole?

A. Among their entire list of depositors.

Q. Yes.

A. The entire number of times out of that number of transactions, where uncollected funds might

(Deposition of William F. Collins.)

be involved, the number of those occasions, as I say, was relatively few. [46]

* * *

Q. Yes, but my question was directed to the experience with accounts of customers exclusively who were making loans.

I just wanted to get from you an idea, based upon your experience, of how many of those checks were returned unpaid; and I do not mean, how many in number, but I mean, what percentage were returned unpaid in those cases wherein you allowed bank customers to draw against uncollected items.

A. I would say, for all practical purposes, that there were hardly any.

Q. In your investigation of the account of the United Produce Company covering a large part of the month of September of 1948, did you find instances where items that made up uncollected funds, were returned unpaid? I mean, instances other than this Defendant's Exhibit 1?

A. No. [48]

* * *

Q. You have testified also, Mr. Collins, that following your discussions with Mr. Redheffer and Mr. LeRoy, [56] an investigation was undertaken by the Credit Department, and you mentioned Mr. Tague.

A. Yes, sir.

Q. What was Mr. Tague's capacity at the bank?

A. He was an accountant, employed to make outside examinations of borrowers' books and records.

(Deposition of William F. Collins.)

Q. Do you know of your own knowledge whether Mr. Tague made such an outside examination after your discussion with Mr. Redheffer and Mr. LeRoy?

A. Yes.

Q. And do you know the result,—or, first, was there one or more than one examination?

A. To my own personal knowledge I only know of the one that he made immediately following the raising of this entire question.

Q. And do you know the result of that examination?

A. I know it as it was discussed at the bank among the officers who had knowledge of the situation.

Q. What, so far as you learned, did that examination disclose?

A. It disclosed the fact that Mr. Tague found their books and their records, as far as entries were concerned, to be in order. [57]

It also disclosed that he had inquired of people of the United Produce Company as to what the checks were, that were deposited by them, and what the checks were for that they issued often to the same people whose checks they deposited.

Q. Yes?

A. (Continuing): And the explanation was that it involved the mechanics, on the one hand, of United Produce Company advancing funds at the start of a crop season, to orchardists and vineyard people, principally in California, to give them working capital to produce a crop, upon which crop the

(Deposition of William F. Collins.)

United Produce Company would then have first claim when it came to harvest; and when it did come to harvest, the United Produce Company bought that crop, and paid the growers for the crop, and the growers in turn drew checks payable to the United Produce Company, to repay the growers' loans.

As I say, that was the explanation which was given by the people at United Produce Company to Mr. Tague, and Mr. Tague brought that explanation back to the people at the Merchandise National Bank.

* * *

[Endorsed]: Filed June 5, 1950. [58]

[Title of District Court and Cause.]

DEPOSITION OF HENRY J. REICHWEIN

* * *

Mr. Erskine: Will you swear the witness please, Mr. Reporter?

Thereupon

HENRY J. REICHWEIN

called as a witness on behalf of the Defendant, having been first duly sworn, was examined upon oral interrogatories, and deposed and said as follows:

(Deposition of Henry J. Reichwein.)

Direct Examination

By Mr. Erskine:

Q. Please state your full name, Mr. Reichwein.

A. Henry J. Reichwein.

Q. Where do you reside?

A. 12036 Harvard Avenue, Chicago, Illinois.

Q. You are an officer of the Merchandise National Bank? A. Yes, sir.

Q. What office?

A. Vice-President and Cashier.

Q. How long have you occupied that position?

A. As Vice-President and Cashier, for, I believe, a year and a half. Previous to that time, for about five years, I was Vice-President, and for about five years prior to that time, I was Vice-President and Cashier.

Q. I see. In other words, there was an interval there during which—— [3*]

A. I was not Cashier.

Q. ——you were not Cashier.

A. That is right.

Q. About how long have you been in the banking business, Mr. Reichwein? A. Since 1907.

Q. You are of legal age, then—just for the benefit of the Reporter. A. Yes, sir.

Q. Would you tell us just in a general way, Mr. Reichwein, your duties as Vice-President and Cashier of the bank. A. Of this bank?

Q. Of this bank.

A. Yes, sir. My duties as Vice-President have

* Page numbering appearing at top of page of original Transcript of Record.

(Deposition of Henry J. Reichwein.)

been those of a loaning officer. The Cashier's duties, to a great extent, have been delegated to other people.

Q. Have been what?

A. Delegated to others, to other people.

Q. I see. Subject to your supervision?

A. That is right.

Q. The Cashier's duties generally include the operation of the bank, do they not? A. Yes.

Q. And the personnel of the bank? [4]

A. That is right.

Q. And the duties as a loaning officer include, I presume, the determination of whether or not credit is to be extended to a borrower, and the amount of such credit.

A. Yes, subject to the supervision, of course, of the Loan Committee.

I have authority up to a certain amount, but beyond that, the loans, before being made, must be approved by the Loan Committee, and the Discount Committee of the Directors.

Q. I see. And they approve actions which are contemplated by you, and recommended by you, do they? A. Yes, sir—and other loaning officers.

Q. Yes. A. That is right.

Q. And I suppose that the duties of a loan officer—or a loaning officer, include the determination of the character and kind of collateral which is to be taken to secure loans, if any collateral is to be taken? A. That is right.

Q. And do they also include the determination of

(Deposition of Henry J. Reichwein.)

whether or not credit is to be extended without any collateral?

A. Yes—we make recommendations, that is.

Q. The loaning officer does not make the final decision? [5]

A. That is right.

Q. He makes recommendations to the Loan Committee; is that what you call it?

A. Yes—the Officers' Loan Committee.

Q. The Officers' Loan Committee?

A. Yes, sir.

Q. Does the Loan Committee make the decision, then, or does it have to go to the directors?

A. The Officers' Loan Committee, if it is a loan over \$10,000, recommends the loan to the Discount Committee, and the Discount Committee has final approval and say-so.

In other words, a loan cannot be made, if it is over \$10,000, unless the loan is recommended by the Officers' Loan Committee to the Discount Committee; and they give final approval.

Q. The Discount Committee is composed of whom?

A. Four or five members of the Board of Directors.

Q. I see. And that was the way in which the bank was functioning during the year 1948?

A. Yes, sir.

Q. I presume that the recommendation of the Loaning Officer to the Officers' Loan Committee, and the recommendations of the Officers' Loan Committee to the Discount Committee of the Board of

(Deposition of Henry J. Reichwein.)

Directors, included all of the [6] details, all of the pertinent details, with respect to any proposed loan which should be before any loaning officer, or Committee, in deciding whether or not a loan should be granted?

Mr. Lasky: Now, just a moment. Tucked away in that question is the word "pertinent" or the words "pertinent information."

Mr. Erskine: Yes. Well, I will withdraw the question. I think that the objection is probably good.

Q. But in any event, Mr. Reichwein, the loan officer does submit certain details to the Officers' Loan Committee, with respect to any loan which he recommends be made, bearing upon the nature of the loan, whether secured or unsecured, and upon the customer to whom the loan is proposed to be made.

A. That is right.

Q. And that information is then handed on by the Officers' Loan Committee to the Discount Committee?

A. That is right.

Q. I take it, Mr. Reichwein, that the Board of Directors of the Bank has given authority to the Discount Committee to make final decision with respect to proposed loans?

Mr. Lasky: If the witness knows of his own personal knowledge, he may answer that question. [7]

Mr. Erskine: I admit it calls for a conclusion, but I am just trying to shorten matters.

Mr. Lasky: Yes, it does.

(Deposition of Henry J. Reichwein.)

Mr. Erskine: If the witness knows.

A. I will answer that question in this fashion, that the Discount Committee of the Merchandise Bank is appointed by the Board of Directors.

Q. (By Mr. Erskine): And does the Board of Directors, upon appointing it, adopt a resolution providing that that Committee should have the power to pass upon proposed loans and reach the final decision with respect to proposed loans?

A. I believe that is in the By-Laws, yes.

Q. Yes. Now, Mr. Reichwein, were you in the year 1948, and in preceding years as a matter of fact, acquainted with the United Produce Company?

A. Yes, sir.

Q. When did the United Produce Company establish an account with, and become a customer of, this bank?

A. I believe it was originally in 1943, and then I believe temporarily the account was closed, and again reopened in 1945.

Q. And then continued from 1945, down to and including, November of 1948? [8]

A. That is right.

Q. Now in 1948, the bank was loaning the United Produce Company—or rather, let me put it this way, Mr. Reichwein: You bankers have an expression that you call “a line of credit,” have you not?

A. Yes, sir.

Q. Would you tell me what is meant when a banker refers to a line of credit to a customer of a bank?

A. Well——

(Deposition of Henry J. Reichwein.)

Mr. Lasky: Just a moment. The witness may testify what he means, and what the usage in this bank is.

Mr. Erskine: Yes.

A. When a line of credit is established, it means that the customer has available to him, credit up to a certain amount, based on the security, if there is any security, in the approval; or if the approval is for an unsecured loan, without security.

Q. Yes?

A. And he may use all or part of that approval during the period for which the approval has been granted.

Mr. Lasky: In other words, there is a maximum beyond which the bank will not make loans to him.

The Witness: That is right. [9]

Q. (By Mr. Erskine): It is a maximum credit?

A. That is right.

Q. And it can be either secured or unsecured?

A. Yes.

Q. Depending upon the terms of the transaction with the customer.

A. Yes, sir.

Q. That is right?

A. That is right.

Q. In the case of the United Produce Company, what was the line of credit that was extended by this bank to that company during 1948, Mr. Reichwein?

Mr. Lasky: Just a moment, please. Well, go ahead. You have already seen the information, the formal matters.

Mr. Erskine: Yes.

(Deposition of Henry J. Reichwein.)

Mr. Lasky: Go ahead.

Mr. Erskine: This is just preliminary.

A. Well, I will tell you, I do not remember off-hand, but I believe that several times during the year 1948, the line was increased. However, I do know this, that during the year 1948, the line was \$200,000 on the assignment of all of their Accounts Receivable, plus some Government Bonds which we were holding as additional collateral. [10]

The Accounts Receivable loan at no time was to exceed \$200,000, regardless of the amount of accounts which were assigned to us.

Mr. Lasky: Do you mind if I interrupt?

Mr. Erskine: Go ahead.

Mr. Lasky: We might as well get some of these things accurate, so that there will not be any room for dispute, about them.

Mr. Erskine: That is right.

Mr. Lasky: The witness said that he was not sure, but he thought that several times during the year 1948, the line of credit was increased.

Is it not a fact, Mr. Reichwein, that there was only one increase in 1948, which brought it up to \$200,000, the line of credit, and that previous increases had occurred in prior years?

The Witness: Well now, I cannot be sure about that without looking at the records.

Mr. Lasky: Well, all right. As long as the records show it, your testimony on that is not given as a certainty.

The Witness: No.

(Deposition of Henry J. Reichwein.)

Mr. Lasky: All right. The records are available.

Mr. Erskine: I think it is already in the record, and these are just preliminary questions. [11]

Q. (By Mr. Erskine): At any rate, Mr. Reichwein, during part of the year 1948, the latter part of the year, the line of credit being extended to the United Produce Company by this bank, was \$200,000; is that correct?

A. Yes—on accounts receivable.

Q. Yes. A. That is right.

Q. And in addition to that, the bank discounted drafts from the United Produce Company?

A. Yes, sir.

Q. Now a loan of \$200,000, secured by assignments of Accounts Receivable, was the legal limit of the bank? A. Yes.

Mr. Lasky: Now, just a moment. I move to strike out the answer of the witness, and request the witness to withhold his answers until I have an opportunity to voice an objection, if I wish to do so.

That question calls for a conclusion of the witness, as to whether or not that is the legal limit, based on various facts.

Mr. Erskine: I will say, I think the objection is good, and I will withdraw the question, and I consent that the answer of the witness may be stricken out. [12]

I was not attempting to trap the witness in any way.

Q. (By Mr. Erskine): The point that I am endeavoring to come to, Mr. Reichwein, is this, that

(Deposition of Henry J. Reichwein.)

that was a large line of credit for the bank to extend, was it not——

Mr. Lasky: Just a moment. [13]

* * *

Q. (By Mr. Erskine): Yes. All right. Now, Mr. Reichwine, I would like to ask you this question also: In what business, according to your knowledge, was the United Produce Company engaged during the time from, according to your recollection, 1945, the year 1945, until the end of November of 1948?

A. The buying and selling of produce.

Q. Throughout the United States?

A. Yes, sir.

Q. And you know as a banker, do you not, Mr. Reichwein, that a concern that is engaged in the business of buying and selling produce, is engaged in a business in which there are great fluctuations in the prices of the commodities in which it is dealing?

Mr. Lasky: Well now, wait a moment. That is assuming [14] something that is not in evidence, namely, that there are great fluctuations.

Mr. Erskine: Well, I am asking him if that is a fact.

Mr. Lasky: You asked for his knowledge, whereas all that he can give you is his understanding.

Mr. Erskine: I just want to get his understanding, his state of mind, about this company.

Will you answer the question, please, Mr. Reichwein?

(Deposition of Henry J. Reichwein.)

The Witness: Would you repeat it, please?

Mr. Erskine: Read it, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

A. I do not believe, and it is not my understanding, that during that period there were wide fluctuations in prices.

Q. (By Mr. Erskine): That is, of the commodities in which the United Produce Company was dealing? A. That is right.

Q. You did not regard that business during that period, then, as a speculative business?

A. No, sir, I did not, because the United Produce Company did not take a position in the market. They were [15] buying only what they had sales for, or what they had orders for.

Q. At least, that was what you were told by Mr. Rosenthal, of the United Produce Company, during that period?

A. That is what the records would indicate, because the statements did not show at any time, any large amount of inventory.

Q. By "the statements," you refer to statements of the United Produce Company?

A. Yes, sir.

Q. Which from time to time were submitted to the bank. A. That is right.

Q. Now, I think you have already mentioned, Mr. Reichwein, the fact that the bank, besides extending a line of credit to the United Produce Company, discounted drafts for them also.

(Deposition of Henry J. Reichwein.)

A. That is right.

Q. And it was doing that during the year 1948?

A. Yes, sir.

Q. You kept in touch with that side of the business, did you, constantly? A. Yes, sir.

Q. You were the loan officer in charge of the loan being made by the bank to the United Produce Company, were you [16] not? A. Yes, sir.

Q. And I take it that each loaning officer of the bank has a certain number of accounts to which he gives his special attention; is that correct?

A. Yes, sir.

Q. And the loan of the bank to the United Produce Company, was one of the loans to which you gave your special attention; is that correct?

A. Yes, sir.

Q. Now, were any of the drafts that were discounted by the bank for the United Produce Company, accompanied by bills of lading?

A. Very few.

Q. Is there any way of determining which of them were so accompanied?

A. I do not believe there would be at the present time, no, sir, because the documents have all been delivered, of course.

Mr. Lasky: That is, when a draft is paid——

The Witness: Yes.

Mr. Lasky: ——the documents accompanying it go on to the man who has paid.

The Witness: Yes, sir. [17]

Q. (By Mr. Erskine): Can you remember any

(Deposition of Henry J. Reichwein.)

instance in which a draft was accompanied by a bill of lading?

A. No, sir, I cannot remember any specific instance of that, at this time.

Q. I call your attention to this bankruptcy claim which the Merchandise Bank filed in the Bankruptcy proceedings of the United Produce Company, and which shows in the statement of account \$117,819.31. Do you remember that item?

A. Yes.

Mr. Lasky: Unless the witness testifies that he had something to do with the preparation of that bankruptcy claim, or otherwise authenticates it, I don't see how you can use that document to refresh his memory about anything at all.

Mr. Erskine: I think I can because, as I understand it, Mr. Lasky, it is agreed, although I am not positive of this, that the photostats attached to the claim are photostats of the original papers that have been photostated, and that those original papers were in the custody of the bank.

Mr. Lasky: It is agreed and understood that the photostats attached to that bankruptcy claim may be used as [18] if they were the originals.

Mr. Erskine: That is right.

Mr. Lasky: So, if you wish to exhibit one of those photostats as if it were the original, and if he knows anything about it, that is all right.

Q. (By Mr. Erskine): Now, Mr. Reichwein, I have already called your attention to the fact that the bankruptcy claim refers to certain unpaid drafts, and I now call your attention to the fact that

(Deposition of Henry J. Reichwein.)

the bankruptcy claim has attached to it photostatic copies of unpaid drafts, together with invoices and delivery orders, there being altogether 56 such documents according to my count, which we will take subject to correction, and I would like to have you take a look at those documents, those drafts, I should say, attached to the bankruptcy claim, together with the accompanying documents, the delivery order and the form of the invoice, and I would like to have you tell me, Mr. Reichwein, whether or not it is the fact that the drafts discounted by the bank for the United Produce Company were in the form of the drafts attached to the bankruptcy claim, and which I have just shown you, and whether or not such drafts were accompanied by papers like delivery orders and invoices attached to the claim, [19] that is, during the year 1948.

A. The drafts which they presented for discount, in the majority of cases, were accompanied by an invoice and a delivery order.

Q. In the majority of cases. Wasn't that practically always true? A. Yes, I would say so.

Q. Now, we had some discussion yesterday with Mr. Messenger relating to this business of pre-posting and delayed posting, and he had me confused. Now, supposing we just start this thing over again. The items that appear upon a statement like the statement of the United Produce Company, Defendant's Exhibits 20 or 21 in this case, are what you bankers call "clearings," which consists solely of counter work, which consists of both debits and credits? A. That is correct.

(Deposition of Henry J. Reichwein.)

Mr. Lasky: Has the witness seen Exhibit 20 to which you have just referred?

Q. (By Mr. Erskine): Have you seen these, Mr. Reichwein? A. No.

Mr. Erskine: They are the statement of accounts of the United Produce Company. [20]

* * *

Thursday, December 8, 1949

Reconvened, pursuant to adjournment, at the hour of 1:30 o'clock p.m.

Present: As before.

(The taking of said deposition was thereupon resumed, as follows:)

Mr. Lasky: For the record, it is now stipulated by and between the Plaintiff and the Defendant in this case, that the statement which I now hand the Reporter, in writing, shall be incorporated into the record as a stipulation of the parties, binding on them for all purposes throughout this case.

Is that correct?

Mr. Erskine: Yes. [38]

Mr. Lasky: I will now hand the Reporter the document just referred to, and ask that it be copied into the record.

Do you also join in that stipulation, Mr. Todhunter, or are you remaining aloof?

Mr. Todhunter: Does this relate to the question of posting, and so forth?

Mr. Lasky: Yes.

(Deposition of Henry J. Reichwein.)

Mr. Todhunter: May I have just a moment to look at it, please?

Mr. Lasky: Certainly.

Mr. Todhunter: Yes; that is all right.

Mr. Lasky: All right.

(The document just referred to is as follows:

“The practice of the Merchandise National Bank in 1948, with respect to posting debits and credits to commercial ledger account was as follows:

“1. In-clearings received on any given day were posted on that day as debits, but the posting occurred under date of the previous business day.

“2. All counter work, whether debits or credits, was posted on the next business day after the day on which they were handled, but the posting [39] appeared under the date on which they were actually handled.

“3. Consequently, the counter work of a given day and the in-clearings of the following business day appear on the ledger as of the same date.

“4. By ‘in-clearings’ is meant checks presented to Merchandise National Bank through the facilities of the Chicago Clearing House and drawn on Merchandise National Bank.

(Deposition of Henry J. Reichwein.)

“5. By ‘Counter work’ is meant all credits and all debts other than in-clearings.

“6. The daily balance appearing under any given date on a commercial ledger account was a balance which gave effect to counter work credits and debits of that day and to in-clearing debits of the next business day, but not to counter work of the next business day.

“Such a balance was called a noon-day balance’ and did not reflect the actual balance either of the date it bears or of the next business day. Where more than one balance appears as of any day, the last such balance is the noon-day balance as above defined.

“The foregoing method of posting, or variations [40] of it, was adopted and used by many banks throughout the United States during the war as a method of clerical economy. A form of it was used by defendant Bank of America National Trust and Savings Association.”)

Mr. Erskine: Shall I proceed with Mr. Reichwein?

Mr. Lasky: Yes.

HENRY J. REICHWEIN

called as a witness on behalf of the Defendant, having been previously duly sworn, resumed the stand **and was examined further upon oral interrogatories, and further deposed and said as follows:**

(Deposition of Henry J. Reichwein.)

Direct Examination

(Continued)

By Mr. Erskine:

Q. Now, Mr. Reichwein, you are familiar with the stipulation to which Mr. Lasky has just referred, are you?

A. Yes, sir. [41]

* * *

Mr. Erskine: It would seem to me that what you have said could not be strictly correct, because the balance of any given day does include, does it not, Mr. Reichwein, the counter work of that day? Off the record.

(There followed here an informal discussion outside the record, which was not recorded by the Reporter.)

Mr. Lasky: I am prepared to state it now, Mr. Erskine.

Mr. Erskine: All right.

Mr. Lasky: It is agreed between the parties, for all purposes of this case, that in order to arrive at the true balance in a commercial ledger account of Merchandise National Bank during the year 1948, for any given date, you take the noon-day balance of that day, as has already been defined, and add to it the sum of all in-clearings which are posted under the same date.

The result of any such procedure will always be to increase the balance; if it is a black balance, it will be a greater black balance; and if it is a [47]

(Deposition of Henry J. Reichwein.)

red balance, it will be either a smaller red balance, or a black balance.

Is that correct?

Mr. Tobey: Yes.

Mr. Lasky: Let me make this addition: In stipulating to this, it is understood that the Plaintiff is confining its stipulation at this time strictly to the commercial ledger account, and the statement we have made is subject, of course, when we speak of a true balance, to the existence of conditional credits, and such other qualifications as may be required by the relationship to other ledger sheets of the particular customer of the bank, such as loan accounts, and so forth, if there is such a relationship; so for the moment we are confining ourselves strictly to the face of the commercial ledger account.

Mr. Erskine: I believe I understand what you have in mind, but I do not understand the purpose of it.

What is it you are driving at?

Mr. Lasky: We have used the expression "true balance."

Mr. Erskine: Yes.

Mr. Lasky: And, using that for present purposes, we are trying to distinguish that from the so-called noon-day balance. [48]

Mr. Erskine: Yes.

Mr. Lasky: The so-called true balance, however, is subject to two modifications; there may be conditional credits which have been entered in the com-

(Deposition of Henry J. Reichwein.)

mercial ledger account, subject to charge-back, if checks come back uncollected; and, secondly, there may be credits in this ledger account which have originated in the Discount or Loan Department, where adjustments of one kind or another may or may not be appropriate, which, if so, would have a necessary reaction upon this ledger account, the commercial ledger account.

In making this stipulation, we want it understood that we do not waive that position, which we may later develop.

Mr. Erskine: Well, as I understand your statement, the stipulation is confined to what appears on the ledger, or the statements of the ledger account.

Mr. Lasky: Yes—the commercial ledger account itself.

Mr. Erskine: Yes. Of course, we do not want to be in the position of stipulating that you are entitled to make any such adjustments.

Mr. Lasky: No, I am not asking you to stipulate that; but in granting my own stipulation about these last [49] definitions, I do it with those qualifications, as to what we reserve the right to contend.

Mr. Erskine: Without any commitment on our part, as to your right.

Mr. Lasky: That is right.

Mr. Erskine: Your right, that is, to pursue the suggestion made in your statement with respect to qualifications.

Mr. Lasky: Correct.

(Deposition of Henry J. Reichwein.)

Mr. Erskine: Well, I think that is all right.

Q. Now, Mr. Reichwein, it appears from what we have just been saying that in order to determine the actual or true balance of the ledger account of United Produce Company as of any particular day, we should add to the balance shown on the ledger, the in-clearing debits of that day, which, under the practice in the bank, are posted as of that day on the next succeeding business day.

That is correct, is it not?

Mr. Lasky: I think that that is what we have stipulated to, yes. A. Yes.

Q. (By Mr. Erskine): Now, I would like to find out from you, Mr. Reichwein, [50] how the in-clearing debits on any particular day to be added to the balance of that day in order to determine the true or actual balance, can be determined—or, to put it another way, can such in-clearing debits be assumed to be all of the debits appearing as of that day, exclusive of the debit memorandums of that day? A. (No answer.)

Mr. Erskine: Off the record.

(At this point there occurred an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: Now, back on the record.

Q. Your answer to that last question, I take it, Mr. Reichwein is “No”? A. That is right.

Q. The fact is that the debits on any particular

(Deposition of Henry J. Reichwein.)

day may include counter work as well as in-clearings? A. Yes, sir.

Q. And therefore, in order to determine the actual balance, or the true balance of any particular day, you would have to segregate the in-clearing debits from the counter work debits?

A. That is correct.

Q. Now, tell me how that is done. [51]

A. You say, how it is done?

Q. Yes. A. Or how it could be done?

Q. Well, how could it be done at this stage with respect to the Merchandise National Bank ledger account?

A. If you had the debits and the cancelled checks, you could pick out the checks which had been presented through the clearings, and by totaling those, as of the given date, and by adding that amount to the balance which appeared, you would then arrive at what you would call the true balance.

Q. And is that the only way in which it could be done? A. Well——

Q. At this juncture?

A. At which juncture?

Mr. Lasky: At which juncture?

Mr. Erskine: At this time.

Mr. Lasky: Do you mean, now?

Mr. Erskine: Yes, as of the Ledger Account of the United Produce Company in 1948.

Mr. Lasky: Well now, I am a little bit confused. Do you mean, do you want to know how he could do it now?

(Deposition of Henry J. Reichwein.)

Mr. Erskine: How we can do it now, with reference to the United Produce Company account as of the period of time in 1948, during which the account of the United [52] Produce Company was maintained in the bank.

Mr. Lasky: In other words, now, in December of 1949, you want to reconstruct the picture in 1948?

Mr. Erskine: Yes, how can he reconstruct it?

Mr. Lasky: How could he do it?

Mr. Erskine: Yes.

Mr. Lasky: All right.

The Witness: I believe I have answered that.

Q. (By Mr. Erskine): That is the only way?

A. I believe so, yes, sir.

Q. That method would involve the possession of the cancelled checks, would it not?

A. I would say so, yes, sir.

Q. As a matter of fact, you kept a Recordat record, did you not, of all of the debit items that went into the account?

A. I cannot answer that question.

Mr. Erskine: Will it be stipulated that this bank kept a Recordat, that is, in the form of a microfilm, according to my understanding, of all debit items that went into this account?

Mr. Lasky: I think you have marked that Recordat film as one of the exhibits to Mr. Messenger's deposition. [53]

Was that not done? That was Exhibit No. 1.

Mr. Erskine: Off the record.

(Deposition of Henry J. Reichwein.)

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: Now, back on the record.

Q. As a matter of fact, Mr. Reichwein, your bank from day to day did make an analysis of the United Produce Company Account during 1948, from day to day, the purpose of which was to show the true balance in that account?

Mr. Lasky: You are asking if that was done?

Mr. Erskine: Yes.

Mr. Lasky: Such an analysis, for such a purpose?

Mr. Erskine: Yes.

Mr. Lasky: All right.

A. No.

Q. (By Mr. Erskine): Did you ever make any such analysis?

Mr. Lasky: Of this account?

Q. (By Mr. Erskine, continuing): Of the United Produce Company Account?

A. No, sir. [54]

* * *

Q. Do I correctly understand your answer to mean, Mr. Reichwein, that as of each of the dates on which such a red balance appears, the Merchandise National Bank did not know the true or actual balance of the United Produce Company?

Mr. Lasky: Now, you have expanded your question from what he knew, to what the bank knew?

(Deposition of Henry J. Reichwein.)

A. I will again say "No."

Q. (By Mr. Erskine): Did you, or did any other officer of the bank, on the days on which such red balances, that is, on any of the days on which such red balances appeared, make inquiry to determine what the true or actual balance of the United Produce Company on such day was?

A. If you mean by that, the construction for the application of the figures as you set forth there, actually, not to my knowledge, no, sir.

Q. Well, what was done if anything with respect to such a matter?

A. Those overdrafts, as shown there, were covered by deposits that had been made during the day. [56]

* * *

Mr. Erskine: Will you make that statement for the record, Mr. Messenger, and I will accept it?

Mr. Messenger: Yes.

Counter work, either debits or credits, bear the impression of a teller's stamp on the face of them, on their face.

In-clearings do not bear any impression of a teller's stamp on their face, but do carry on the reverse an IBM impression of date.

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: The microfilm we have been talking

(Deposition of Henry J. Reichwein.)

about contains a picture of the face of the checks, and of all debit memos, and those pictures contain the necessary data to determine whether each debit item was an in-clearing or counter work, and those contain the information necessary for your reconstruction.

Mr. Erskine: The data to which you refer is this, as I understand it, that the microfilm will show on the checks creating debits, and which constituted counter work, a teller's stamp; whereas, all in-clearing checks will not show on the microfilm any such stamp? [60]

Mr. Messenger: That is correct.

Mr. Erskine: Is that right, Mr. Lasky?

Mr. Lasky: As I understand it, yes.

Q. (By Mr. Erskine): What is your best recollection, Mr. Reichwein, with regard to this point: These exhibits that I have mentioned show as of certain days a red balance. That red balance under our stipulation is a noon balance. What is your recollection as to whether or not on each of such days when a red balance, a red noon balance appears that actually that true balance was a black balance?

A. I will answer that by saying that I do not believe that we had an actual overdraft on the United Produce Company Account, after considering those deposits.

Q. What deposits?

A. That came in during the day.

Q. In other words, the red noon balance was

(Deposition of Henry J. Reichwein.)

converted into a black balance by deposits made during the day? A. That is right.

Q. In each case where a red balance appears?

A. Yes, sir.

Q. You are quite positive about that, are you?

A. I could not be positive without looking at the records because, after all, there was a thirty-day period [61] when I was away on a vacation.

Q. When were you away on a vacation in 1948?

A. September 20th, I believe, until October 18th.

Q. Who was in charge of the account while you were away?

A. Both Mr. LeRoy and Mr. Cottle had something to do with it.

Q. Mr. Cottle? A. Mr. Cottle.

Q. How do you spell the name?

A. C-o-t-t-l-e. I am not so sure that Mr. Cottle had anything to do with it regularly, except maybe on a Saturday if Mr. LeRoy was away, but normally Mr. LeRoy is the one that took over.

Q. So, my understanding of your testimony is, and you tell me if I am correct or not, your best recollection is that the red balances shown on this account which were, under the stipulation, noon balances, were, on each occasion, when such a red balance appeared, converted into a black balance by the close of the day?

A. To the best of my knowledge, that is right.

Q. Now, there was marked in this case upon the taking of the deposition of Mr. Messenger, Exhibit No. 64, which I now show you. That exhibit pur-

(Deposition of Henry J. Reichwein.)

ports to be the form [62] used by your bank as a report on overdrafts, that is correct, is it not?

A. That is part of the overdraft record sheet for a day, I believe, yes, that is correct.

Q. And it was the practice of your bank during 1948, to prepare reports with respect to overdrafts?

A. Daily, yes.

Q. Daily. As I understand it, although I may again be wrong, the report was divided into two different sections, one headed "Overdrafts covered by deposits," and the other "Currency Exchange Overdrafts," is that right?

A. No, sir; there was a division called "Overdrafts," and another division called "Overdrafts covered by deposits," and that currency exchange was another division.

Q. There were three divisions to the report, then?

A. There are more, but when you are referring to overdrafts, there were three, yes, sir.

Q. Now, when there was a noon red balance it would show up on the report of overdrafts, would it not?

A. Yes, sir.

Q. And when it showed up the officer in charge of the account or, rather, when it showed up the noon red balance [63] would be called to the attention of the officer in charge of the account, is that right?

A. Yes, sir.

Q. It is correct to say, is it not, Mr. Reichwein, that when the noon red balances of the United Produce Company Account appeared on that ledger

(Deposition of Henry J. Reichwein.)

sheet those noon red balances would come to your attention as the officer in charge of the account, during the day? A. Yes, sir.

Q. And that is with the exception of the time that you were away on vacation?

A. That is right.

Q. When such noon red balances would be called to your attention at the same time the checks creating the noon balance would be—that is, the debit items creating the noon red balances would be called to your attention?

A. You mean the presentation of the actual checks?

Q. Yes. A. Not necessarily, no.

Q. On many occasions such checks were presented to you? A. Not in all cases.

Q. But in many? A. That is right.

Q. What time of day would the overdraft report be presented [64] to you?

A. I would say generally that they would have the United Produce Company posted somewhere along about 1:30 or so.

Q. That is, the posting would be done as of that time that would create the noon balance?

A. The noon-day overdraft, that is right.

Q. The noon-day overdraft, as you expressed it?

A. Yes, sir.

Q. And at that time the overdraft report would be presented to you?

A. No, sir; the report was not presented until the next day.

(Deposition of Henry J. Reichwein.)

This overdraft report is made at the end of the day, because it could not be prepared, because we don't know if there were any overdrafts that were covered by deposits until we had had a chance to check the bookkeeping sheet; the bookkeeping sheet would be presented showing the red figure, but this report you speak of would be made up and circularized the next day.

Q. As I understand it, Mr. Reichwein, it was the practice of the bank when a noon red balance appeared in an account for the bookkeeper to present the statement itself, the ledger sheet itself? [65]

A. The sheet, yes.

Q. The ledger sheet itself to the officer in charge of the account? A. Yes.

Q. Whereas the report of the overdrafts was not prepared until the evening?

A. That is right, or probably the next morning, and circularized by eleven o'clock, or some such time.

Q. And the overdraft report of any particular day was circularized on the succeeding business day? A. That is right.

Q. Now, when the bookkeeper presented the sheet to you showing a noon red balance in the United Produce Company account did the bookkeeper at the same time show you the checks constituting the debit items creating that balance?

A. In the majority of cases, yes.

Q. Wouldn't it be accurate to say that in all cases, with the exception of a relatively few?

(Deposition of Henry J. Reichwein.)

A. Yes; I think that is a fair statement.

Mr. Erskine: I wonder if we could take a short recess at this time.

Mr. Lasky: Surely. [66]

* * *

Q. (By Mr. Erskine): When did you first become acquainted with Mr. Rosenthal?

A. About 1905.

Q. Have you known him fairly well ever since?

A. I knew him very well for about four or five years. [85]

Q. After you first met him, Mr. Reichwein?

A. Yes, sir. Would you like for me to tell you just how?

Q. I don't want to go into the details.

A. We played indoor baseball for four or five years. Then I lost track of Mr. Rosenthal and never saw him again, I would say, until 1937 or 1938.

Q. Then did you meet him again in a personal or business way?

A. No; I met him in a business way. He was connected with another produce company and came into this bank and asked if we would be interested in handling some of their business.

Q. Did you handle some of the business of that other produce company? A. Yes, sir.

Q. What was the name of the company?

A. L. Gillarde Company.

Q. Then later on Mr. Rosenthal established the account of the United Produce Company, did he, with the bank here? A. Yes, sir.

(Deposition of Henry J. Reichwein.)

Q. Did you ask him to do that, Mr. Reichwein? [86]

* * *

A. No, sir.

Q. But you knew during 1947 and 1948 that Mr. Oddo was taking a part in the management of the affairs of the United Produce Company?

A. Yes, sir.

Q. You have known, have you not, Mr. Frank C. Lofendo for some time?

A. I do not know Frank C. Lofendo.

Q. Did you ever meet him?

A. Not to my knowledge, no, sir.

Q. Did you ever learn through your contact with the United Produce Company, that a man by the name of Frank C. Lofendo was working for it?

A. No, sir.

Mr. Lasky: Now, just a moment—well, never mind. All right. He has answer “No.”

Q. (By Mr. Erskine): Can you state—did you ever meet a man by the name of Gassman in connection with the business of the Merchandise National Bank?

Mr. Lasky: Just a moment.

Q. (By Mr. Erskine, continuing): —that is, with United Produce Company?

Mr. Lasky: If the question is confined to the period [91] prior to November 20th, 1948, I have no objection.

If it is after that period, then I may or may not

(Deposition of Henry J. Reichwein.)

have an objection. What is the purport of your question?

Mr. Erskine: I will confine it to the period prior to November 20th, 1948.

The Witness: Now, what is the question?

Q. (By Mr. Erskine): Did you know Gassman prior to that time? A. Yes, sir.

Q. How long had you known him?

A. I believe, for three or four years. Gassman was the bookkeeper—I am not sure——

Mr. Lasky: Bookkeeper for whom?

The Witness: Of the United Produce Company. I am not sure that he was the bookkeeper at the very beginning, however, but I know he was the bookkeeper for several years.

Q. (By Mr. Erskine): And prior to 1948, you, in connection with your supervision of this account for the bank were in frequent communication with Mr. Gassman, were you not, Mr. Reichwein?

A. I saw Mr. Gassman almost every day. [92]

Q. That is, prior to November 20th, 1948?

A. Yes, sir.

Q. And continuing from, let us say, the 1st of the year of 1948; is that right? A. Oh, yes.

Q. Almost every business day?

A. That is right.

Q. And from time to time you would have a conversation with Mr. Gassman about the affairs of the United Produce Company, would you not?

A. No, sir.

(Deposition of Henry J. Reichwein.)

Q. What would be your business with him when you saw him?

A. Well, Mr. Gassman would bring in the loans.

Q. By "loans," do you mean the accounts receivable?

A. Yes, sir, and he would also bring in the drafts that we were discounting.

Mr. Lasky: And the notes?

The Witness: And the notes, that is right. He would bring them to me, for my o. k.

Q. (By Mr. Erskine): And that was true during all of 1948; is that correct?

A. Yes, sir.

Q. Up to November 20th? [93]

A. Yes, with the exception of the time when I was on my vacation.

Q. Yes?

A. And also on Saturdays, if I happened to be off, or if I was not here when Gassman came in.

Q. Yes. So as I understand you, Mr. Reichwein, Mr. Gassman would bring to you, for example, drafts which the United Produce Company wanted the bank to discount; is that right?

A. That is right, sir.

Q. So that you could o. k. those drafts?

A. Yes, sir.

Q. And he would also bring to you schedules of accounts receivable which were being pledged to the bank to secure its loan to the United Produce Company?

A. That is right.

Q. So that you could o. k. those schedules?

(Deposition of Henry J. Reichwein.)

A. That is right.

Q. And when the United Produce Company executed new notes, to evidence part of its indebtedness to the bank, those notes would be brought in by Mr. Gassman, and would be presented to you for your o. k.; is that right?

A. That is right. [94]

* * *

Q. All right. Now, in the case of those duplications, the drafts would also be delivered to you for your o. k., would they not—or, all drafts—let me put it that way, in order to be fair?

In all cases, drafts of the United Produce Company which were being discounted at the bank were submitted to you for your o. k.; is that right?

A. All drafts which were discounted had to be approved—that is correct.

Q. By an officer of the bank?

A. That is right.

Q. And that officer was you, when you were present in the bank, is that correct?

A. Yes, sir.

Q. And you were present in the bank during 1948 on every business day, I take it, except the days on which you were on vacation?

A. Or Saturdays.

Q. Or Saturdays, yes. A. Yes, sir.

Q. Well the bank is closed on Saturday, is it not?

(Deposition of Henry J. Reichwein.)

A. No, sir; the bank just started closing Saturday about three months ago. [101]

* * *

Mr. Lasky: To see whether or not that was true throughout the year 1948, as we believe it to be true of the early months.

Mr. Erskine: Yes.

Mr. Lasky: And if it is so, the stipulation will be corrected accordingly.

Mr. Erskine: Very well. Now, the next point that I want to mention, at the beginning, in order to arrive at what are the correct facts in this case, which we all want to do, I have no doubt, is this: We also took a look at the cancelled checks, drawn by Lofendo to the order of the United Produce Company, which I believe, although I may be mistaken about this, would be applied, according to my understanding, on account of the loan of the Merchandise Bank to the United Produce Company, and which, according to our understanding, would be part of the counter work of the bank and which, therefore, according to Mr. Messenger's suggestion, should bear the teller's stamp in order to distinguish them as counter work from the in-clearings appearing in the account as of the same day.

We find that those checks do not bear such a stamp, and consequently it may not be that the checks actually debited against the account, constituting counter [106] work, bear such stamp, to enable us to segregate such checks from the in-

(Deposition of Henry J. Reichwein.)

clearings debited against the account on the same day.

Now, as I say, that may or may not be a correct statement, but I just want to suggest the point.

Mr. Lasky: This time Mr. Tobey is wrong. Our discussions, and the stipulation of yesterday, had to do strictly with the Commercial Ledger Account.

Mr. Erskine: That is what occurred to me, as I was making the statement.

Mr. Tobey: As you made the statement, that is right.

Mr. Erskine: So I take it, then, we can abandon the point that I have just been discussing.

Now, off the record again.

(There followed at this point a further informal discussion, outside the record, which was not recorded by the Reporter.)

Direct Examination
(Continued)

By Mr. Erskine:

Q. Apropos of what I was just saying, I understand the fact to be that checks which are counter work and which are reflected in the statement do bear a teller's stamp?

Mr. Messenger: That is right. [107]

* * *

Q. (By Mr. Erskine): Now, Mr. Reichwein, I believe that your testimony is that when the United Produce Company would make a payment on ac-

(Deposition of Henry J. Reichwein.)

count of its obligation, the bank contemporaneously with such payment would make another loan to the United Produce Company, in the amount of the payment? A. No.

Mr. Lasky: That is not his testimony.

Mr. Erskine: Well, I am asking him.

The Witness: No, sir.

Q. (By Mr. Erskine): Were not the new loans and payments substantially contemporaneous, so that the total amount of the obligation was maintained at the \$200,000 limit?

A. What do you mean by "contemporaneous"—at the same time?

Q. Well, not simultaneous, but on the same day.

A. Now, just what is the question again?

Q. Well, were new loans made to the United Produce Company at about the same time that payments were made by it on account of its obligation to the bank? A. Yes. [158]

Q. On the same day, usually? A. Yes.

Q. Now, at the time new loans were made to the United Produce Company, they would file a new schedule of accounts receivable—that is with each new loan, they would file, as I understand it, a schedule of additional accounts receivable?

A. Yes, sir.

Q. Now I show you here, Mr. Reichwein, Defendant's Exhibit 27, that is, the group of documents marked collectively as Defendant's Exhibit 27 for identification, and I will ask you to just

(Deposition of Henry J. Reichwein.)

glance over that exhibit, if you well, please, that is, that group of documents.

(The documents referred to were examined by the witness.)

Mr. Lasky: Is that 27?

Mr. Erskine: That is the way I interpret it.

The Reporter: That is correct.

Mr. Lasky: Mr. Erskine is a better decipherer of foreign script than I am. Incidentally, that is Exhibit 27 to the Messenger deposition, is it not?

Mr. Erskine: Yes.

The Witness: Yes, sir.

Q. (By Mr. Erskine): You have [159] now examined the instruments in that group of documents, Defendant's Exhibit 27 for identification to the Messenger deposition, have you, Mr. Reichwein?

A. Yes, sir.

Q. Now, when the new loans were made, at the same time the payments were made—or rather, not at the same time, but at about the same time the payments were made——

Mr. Lasky: Following payments, is that what you mean?

Mr. Erskine: Yes, following payments.

Mr. Lasky: All right.

Q. (By Mr. Erskine, Continuing): ——each new loan would be evidenced by a note, would it not?

A. Yes, sir.

Q. And the note would be accompanied by a

(Deposition of Henry J. Reichwein.)

schedule similar to the schedules in this Messenger Exhibit 27 for identification; is that correct?

A. Yes, sir.

Q. Together with an assignment similar, we will say, to Defendant's Exhibit 27-B for identification.

A. Yes, sir.

Q. And at the time that each such new loan was made, the note evidencing it would be approved by you, would [160] it not?

A. If I was here, yes, sir.

Q. And, at the same time, you would be shown the schedule of the new accounts receivable being assigned to the bank?

A. Yes, sir.

Q. That is, you would be shown the accounts receivable—the schedule of the accounts receivable in the form of the schedules in Defendant's Exhibit 27 for identification, Witness Messenger—that is, in the group of documents marked collectively as Defendant's Exhibit 27 for identification.

A. Yes, sir.

Mr. Lasky: Do you mind if I endeavor to clarify something just at this point?

Mr. Erskine: Go right ahead.

Mr. Lasky: If I understand it correctly, Mr. Reichwein, Defendant's Exhibit 27 for identification, Witness Messenger—or that is, the forms which appear collectively as Defendant's Exhibit 27 for identification, and similar forms, were the assignments that were used on any loans made during a month; is that correct?

(Deposition of Henry J. Reichwein.)

The Witness: That is right. [161]

* * *

Q. And at that time you would tell Mr. Eiler—or rather, on some of those occasions, would you tell the Manager of the Bookkeeping Department that you expected, or believed, that the United Produce Company was to make an additional payment on account of its obligation to the bank, and when such payment was made, a new loan would be made by the bank to the United Produce Company, and that at that time the United Produce Company would receive a credit to its account, a credit in the General Commercial Account?

Mr. Lasky: Just a moment. Will you re-read that question, please, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

Mr. Lasky: Do you understand that question, Mr. Witness?

The Witness: Yes.

Mr. Lasky: You do understand it?

The Witness: I think so.

Mr. Lasky: Well, all right, then; go ahead and answer it. You are being asked whether you told Mr. Eiler that you expected, or believed, that a whole series of things was about to happen.

A. I never mentioned to Mr. Eiler that any payments were expected to be made on the loan. If Mr. Eiler referred [166] to noon-day overdraft to him——

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): "——to me?"

A. (Continuing): I mean, to me, I would approve it, if a credit had already been made to the United Produce Company.

Q. And those credits usually represented new loans, made by the bank to the United Produce Company; is that correct? A. Yes, sir.

Q. So that at the time the noon-day balances were called to your attention, or on many of the occasions when the noon day balances were called to your attention, you knew that on that day such a credit was to be passed to the United Produce Company?

Mr. Lasky: No, that is not what his testimony was.

Mr. Erskine: I am asking him.

Mr. Lasky: He did not testify to that.

Mr. Erskine: I am not saying that he did testify to it. I am just asking him.

A. I did not approve of the overdraft, noon-day overdraft, unless a loan or other deposit had already been made. [167]

Q. (By Mr. Erskine): On that day?

A. On that day, yes, sir.

Q. Which would ultimately be passed to the credit—— A. Yes.

Q. (Continuing): ——of the account of the United Produce Company? A. Yes, sir.

Q. Now, for example, Mr. Reichwein, referring you to Defendant's Exhibit No. 64 for identification, which was marked on the deposition of Mr. Messen-

(Deposition of Henry J. Reichwein.)

ger, it shows here on the right-hand side "H. R.—Dis.—\$30,948.92," and underneath the "H.R." appears the abbreviation "Coll."

What does that mean, or what does that memorandum which I have just read to you, indicate?

A. This notation indicates that as of this date, a noon-day overdraft appeared on the account of the United Produce Company, of \$30,948.92, and that this overdraft was covered by a loan in the Discount Department, on accounts receivable, and advances on drafts which were credited to the United Produce Company through the Collection Department.

Q. All right. Then can I say, Mr. Reichwein, that that notation was typical of similar notations made on other [168] reports with respect to overdrafts by you, concerning the United Produce Company?

A. That is the usual form in which those reports were prepared—yes, sir.

Q. And that notation——

A. That is the notation that was used——

Q. Yes.

A. ——to indicate——

Mr. Lasky: What notation? Pardon me; go ahead; I did not mean to interrupt you.

A. (Continuing): ——from which source the credit had been made.

Q. (By Mr. Erskine): Yes, and notations of that sort were frequent on such overdraft reports in the case of the United Produce Company, where those noon-day balances appeared?

(Deposition of Henry J. Reichwein.)

Mr. Lasky: You refer to a notation identical with that?

Mr. Erskine: Not identical, no, but in the same general form.

Mr. Lasky: You mean, notations indicating the character of whatever credit it was?

Mr. Erskine: Yes.

Mr. Lasky: Which countered the supposed overdraft?

Mr. Erskine: That is right. [169]

A. That is correct.

Q. (By Mr. Erskine): Now, when such notations were made, Mr. Reichwein, you of course would inquire as to the source of the credit to be passed to the account of the United Produce Company, I take it, would you not?

A. No, sir. I think I mentioned to you in your testimony here yesterday that this form was prepared at the end of the day.

Q. Yes?

A. And was passed to the officers the following day.

Q. Yes, that is right, you did so testify; but my recollection is—well, at any rate, Mr. Reichwein, your testimony now is, since you have refreshed my memory, that the bookkeeper would call your attention to the appearance of the noon-day balance in the red?

A. Yes, sir.

Q. And at that particular time, you would determine whether or not there was any offsetting credit?

A. Yes, sir.

(Deposition of Henry J. Reichwein.)

Q. And when you determined whether or not there was an offsetting credit, you would determine, would you not, how that offsetting credit was to come into existence.

Mr. Lasky: Was to come into existence, or had come [170] into existence?

Mr. Erskine: That is, how it had come into existence.

A. Yes, sir.

Q. (By Mr. Erskine): That is, you would determine, for example, that payments had been made on account of the obligation owing by the United Produce Company to the bank, and that at about on the same day, a new loan was to be made by the bank to the United Produce Company, creating a credit.

That is so, is it not?

A. When I approved the sheet which indicated an overdraft, my approval was based on deposits arising either from loans on accounts receivable, or from credits from the discounting of drafts.

Q. When it was based upon loans, did you know the payments that had been made to the bank at about the same time that the loan was made by the bank to the United Produce Company?

A. The payments were presented to the Discount Department direct. A line was in effect, and my approval always was for the loan, providing it did not exceed the limit of the credit. [171]

(Deposition of Henry J. Reichwein.)

The payment of accounts did not automatically bring about a credit.

Mr. Erskine: I understand that. I was trying to abridge it.

Mr. Lasky: That is the difficulty, when you abridge it you falsify it.

Mr. Erskine: I was trying to abridge it to use but a few words.

Q. (By Mr. Erskine): Now, when the payments which were made, and which were in the usual cases, with certain exceptions, accompanied by loan were made, those payments represented uncollected funds, did they not?

A. You are losing sight of one important point, here, and that is that we have an excess of collateral.

Q. That may be true by way of argument, Mr. Reichwein, but what I am asking you is this, and the answer to it I believe is quite obvious, that the checks representing payments about which we have been talking were uncollected funds until the proceeds of the checks were collected, that is so, isn't it? You knew that?

Mr. Lasky: If I understand that question it means: Were checks uncollected until they were collected?

Mr. Erskine: That is about what it comes [177] to.

Q. (By Mr. Erskine): That is a fact, isn't it?

A. Yes, sir.

Q. And the fact also is that when those payments were made you thereafter made a loan, on that same day you made a loan in the amount of

(Deposition of Henry J. Reichwein.)

those payments, to the United Produce Company, with certain exceptions, that is so, isn't it?

A. No, sir.

Q. What is the fact?

A. It does not necessarily follow that an exact amount was advanced equal to the amount of the payments.

Q. But in the great majority of cases that was so? A. Yes, sir.

Q. Now, did the fact that, did the circumstances that we have just been considering, prompt you to make inquiry as to the checks which constituted these payments, who was drawing these checks?

A. No. sir. [178]

* * *

Q. (By Mr. Erskine): That is, you knew the debtors named in the schedules were the persons making the payments?

A. I assumed that they were.

Q. You knew that payments were being made by the debtors listed in the accounts receivable schedules, did you not? A. Yes, sir.

Q. Now, I think I asked you this before, but I am not positive, so I will have to find out. I show you a telegram, Mr. Reichwein, that was marked on the taking of the deposition of Mr. Estribou, a telegram dated October 20, 1948, and it is addressed to——

Mr. Lasky: If you give me the Exhibit Number I will get my copy. [181]

Mr. Erskine: I haven't the Exhibit Number, the

(Deposition of Henry J. Reichwein.)

number was not put on these exhibits in the file that I have.

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: Read the question as far as I got.

(The question of counsel was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): —J. N. Tarr, Assistant Cashier, Bank of America, and I will ask you if you sent that wire, Mr. Reichwein?

A. Yes, sir.

Mr. Erskine: Mark this as Defendant's Exhibit 2, please.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 2 for identification.)

Q. (By Mr. Erskine): The wire which you just stated is the exhibit that has been marked as Defendant's Exhibit No. 2, is that not correct?

A. Yes.

Q. To follow out Mr. Lasky's numbers, that is the same [182] wire that was marked Plaintiff's Exhibit 4 upon the taking of Mr. Estribou's deposition.

Mark this as Defendant's Exhibit No. 3.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 3 for identification.)

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): I show you a letter that has been marked as Defendant's Exhibit 3, and ask you if that is not the letter referred to in the wire that has just been marked as Defendant's Exhibit 2?

The Witness: Read the question, please.

(The question was thereupon read by the Reporter as above recorded.)

The Witness: I would not know that.

Q. (By Mr. Erskine): Well, I call your attention to the fact that—I was in error in putting that question to you. Defendant's Exhibit 2 states this:

“Suggest you contact your main branch at Fresno, California, who have complete information.”

I will ask you, Mr. Reichwein, when you stated that in Defendant's Exhibit 2, did you have reference to [183] Defendant's Exhibit No. 3?

A. Yes, sir.

Mr. Erskine: For the record, Defendant's Exhibit 3 is the same Exhibit as was marked as Plaintiff's Exhibit 6-B upon the taking of the Estribou Deposition.

Now, mark this as Defendant's Exhibit No. 4.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 4 for identification.)

Q. (By Mr. Erskine): I show you what purports to be a copy of a wire which has been marked Defendant's Exhibit 4, and I will ask you, Mr.

(Deposition of Henry J. Reichwein.)

Reichwein, when you prepared your wire, Defendant's Exhibit No. 2, I take it that you had before you Defendant's Exhibit No. 3?

A. Yes, sir.

Q. I am asking you whether you also saw at that time Defendant's Exhibit No. 4?

A. No, sir, I did not.

Q. Now, Mr. Reichwein, I believe you have testified that you did not know what the true, or actual balances in the Commercial Account of the United Produce Company were during the period from July 1st on, during the period covered by the exhibits which have been introduced [184] in evidence upon the taking of these depositions, and when that account showed a noon-day red balance, that is correct, is it?

A. When that account showed a what?

Q. A noon-day red balance?

A. You say that we did not know——

Q. The true balance, true or actual balance on those days?

A. I believe you asked me before whether we had ever constructed or prepared a record of the true balance, that was your question before, I believe.

Q. I think that that was one of my questions. Your answer to that was, "No," as I remember it.

A. That is right.

Q. I also asked you whether or not when the red noon-day balance appeared in the account you

(Deposition of Henry J. Reichwein.)

knew the actual balance: What was your answer to that? A. (No response.)

Q. I will put it to you this way:

When the Commercial Account of the United Produce Company showed a non-day red balance did you personally know the true or actual balance in the account on the days on which those red noon-day balances appeared? A. No. [185]

Q. And that, of course, was true when you sent this wire of October 20th, 1948, Defendant's Exhibit 2? A. Yes, sir. [186]

* * *

Q. (By Mr. Erskine): Now, Mr. Reichwein, in this letter which you say you had before you when you sent your telegram, that is, Defendant's Exhibit No. 3, it says that:

“We hold at their disposal a line of credit to the extent of our legal loaning limit of \$200,000 under special arrangements, and find that they make proper use of those commitments.”

Now, at the time you sent your wire did you know what the practice of the United Produce Company was with respect to making payments on account of accounts receivable signed by it to the bank, that is, payments [188] to the bank on that account?

A. What do you mean by the “practice?”

Q. What they did, what the United Produce Company was doing at that time with respect to making payments on account of the accounts receivable it had assigned to the bank?

(Deposition of Henry J. Reichwein.)

A. I think I have testified several times that the United Produce Company made payments on the accounts receivable.

Q. But you did not know the manner in which those payments were being made, did you?

A. The details, no, sir.

Q. And at the time you sent your wire you did not inquire as to the manner in which such payments were being made? A. No, sir. [189]

* * *

Q. (By Mr. Erskine): At the time you sent your wire you were familiar with Defendant's Exhibit 25 on the taking of the Messenger deposition, were you not? A. Yes, sir.

Q. Paragraph 9 of this Messenger Exhibit 25 states:

“Collections on the accounts are to be forwarded in the form in which received, duly endorsed, to the bank daily, on the day on which received at the office of the Company. Daily collection transmittals are [192] to be accompanied by a report identifying the account paid, the assumption being that customer payments received are applied without exception to the indebtedness of that customer oldest in point of time.”

When you sent your wire did you make inquiry to determine whether or not the United Produce Company was complying with that provision of Messenger Exhibit No. 25? A. No, sir.

(Deposition of Henry J. Reichwein.)

Q. Your wire states the net worth of the company at over \$80,000. When you made that statement in your wire upon what did you base the statement?

A. The financial statements that had been given to us by the company.

Q. The financial statements to which you refer are the financial statements which we were considering the other day, and which have been marked in this case on the taking of the Messenger deposition as Defendant's Exhibits Nos. 52, 53, 54 and 55, is that correct?

A. Yes, sir. [193]

* * *

Q. Nothing occurred prior to that date to suggest to you that that might be the fact?

A. On November 17th, I testified before that I called in Mr. Rosenthal regarding the checks which had been returned.

Q. Yes, but prior to November 17th nothing had occurred of any sort, either in the bank's operations, or no one had told you anything which had led you to suspect that the United Produce Company might be engaged in a kiting operation?

A. I had no knowledge, and never was advised, or knew of anything regarding a kiting operation.

Q. And you did not suspect it prior to November 17th?

A. No, sir.

Q. Now what led you, Mr. Reichwein, to call Mr. Rosenthal in on November 17th, in order to discuss with him the affairs of his company?

(Deposition of Henry J. Reichwein.)

What took place at that time, to occasion that action?

A. I called in Mr. Rosenthal because three checks had been returned, which were received in payment of accounts receivable, and those checks were returned for either the reason of "Uncollected Funds" or "Not Sufficient Funds," [204] I cannot just recall.

Q. Who drew those checks; do you remember?

A. Frank C. Lofendo.

Q. And was that the only reason why you called in Mr. Roesnthal on that occasion, that those three checks had been returned, either for "Insufficient Funds," or "Uncollected Funds?"

A. Yes, sir.

Q. Had anything else occurred on that day, or prior thereto, that made you believe that something might be wrong with the affairs of the United Produce Company? A. Absolutely not.

Q. Did anything else occur on that day, November 17th, that prompted you to believe that something might be wrong with the affairs of the United Produce Company.

A. I told you that the checks were presented in the morning, or the checks were brought to my attention in the morning, and I immediately 'phoned Mr. Rosenthal, and asked him to come in.

Q. That is, the three checks? A. Yes.

Mr. Lasky: The three returned checks.

The Witness: Yes.

Mr. Erskine: The three returned checks. [205]

(Deposition of Henry J. Reichwein.)

Mr. Lasky: When they first came to this bank.

The Witness: Yes.

Mr. Lasky: In the morning.

The Witness: Yes, sir.

Q. (By Mr. Erskine): Did you know whether or not other checks of Lofendo had been returned to the bank prior to November 17th?

A. No, sir.

Q. Do you know when the three checks to which you have referred, which were called to your attention, arrived in your bank?

A. (No answer.)

Q. Was it the 17th? A. Yes, sir.

Q. And it was not called to your attention that any other checks of Lofendo had been returned to this bank on a date prior to the 17th? A. No.

Q. You did not know that? A. No, sir.

Mr. Lasky: Do you imply that there were some?

Mr. Erskine: Why, surely, but that is neither here nor there. It is not proper at this time, and I am not going [206] to engage in any argument about the thing.

Q. (By Mr. Erskine): Now, when you called Mr. Rosenthal in on November 17th, Mr. Reichwein, did you have a discussion with him in the bank here? A. Yes, sir.

Q. Did anybody participate in that discussion besides yourself and Mr. Rosenthal?

A. Not at the start, no, sir.

Q. Now, what was said between you and Mr.

(Deposition of Henry J. Reichwein.)

Rosenthal at the beginning of the conversation, before anybody else participated in it?

A. I called his attention to the three checks which had been returned, of Frank C. Lofendo, and I asked him, what was the reason.

Q. What did he say?

A. Well, he said, "I believe if you will put them through again, they will be paid."

Q. Yes? And what else if anything was said in that conversation?

A. Well, then I questioned him as to why these checks were returned, and he mentioned the fact that very likely deposits had been made, but they had not been cleared, and if the checks were again put through, they would be [207] paid.

Q. Was anything else said between you and Mr. Rosenthal before somebody else participated in the conversation, in addition to what you have stated?

A. Yes.

Q. What was that?

A. I questioned him with regard to whether there might be a possibility of any other checks being returned, and he said no; and I repeated the question, and then he said, "Yes, there might be a few more checks returned."

Q. And then what was said in that conversation?

A. Then we discussed the matter further, and he finally admitted that there might be between \$100,000 and \$110,000 in checks which might come back.

(Deposition of Henry J. Reichwein.)

Q. Now then, this all took place before anyone else participated in the conversation, do I understand correctly? A. Yes, sir.

Q. All right. Now, could you tell me in a little more detail, Mr. Reichwein, what the conversation was? Did Mr. Rosenthal say what checks would be returned, or did you ask him what checks would be returned?

A. Yes, sir, he indicated that more checks of Frank C. Lofendo would be returned. [208]

Q. Did he say anything about the checks of anybody else? A. No, sir.

Q. Now, have you told me everything you can tell me with respect to this conversation between you and Mr. Rosenthal which took place on November 17th, before the participation of others?

A. Yes, sir.

Q. And you cannot recall anything else that was said in that conversation? A. No, sir.

Q. Is it not a fact, Mr. Reichwein, that prior to November 17th, certain drafts had been returned to the bank—just prior to November 17th certain drafts had been returned to the bank, drafts drawn by United Produce Company, had been returned to the bank unpaid?

A. I do not know that of my own personal knowledge.

Q. That was not called to your attention prior to the date on which the conversation between you and

(Deposition of Henry J. Reichwein.)

Mr. Rosenthal took place, which has just been mentioned? A. That is right. [209]

* * *

Q. Did you have any conversation with Mr. Rosenthal later on that day? A. Yes, sir. [214]

Q. Or night? A. Yes, sir.

Q. And where did that conversation take place?

A. That conversation took place at the offices of the United Produce Company.

Q. In Chicago here?

A. In Chicago, yes, sir.

Q. And who took part in that conversation?

A. Mr. Riordan, Mr. Royds, Mr. Rudolph, Mr. Tague, myself, Mr. Rosenthal, and Mr. Gassman.

Q. Now, approximately what time in the evening did that conversation take place?

A. I cannot tell you exactly when that conversation commenced, but I believe that it was somewhere in the neighborhood of between seven and eight o'clock.

Q. And how long did the conversation then continue?

A. For maybe an hour, or an hour and a half.

Q. Now, would you tell me what was said in that conversation by the various persons who took part in it?

A. Well, it was a repetition of what we had covered previously, I would say, but at that particular time I suggested to the boys that we all walk out of the room and let Mr. Riordan have a personal

(Deposition of Henry J. Reichwein.)

talk with Mr. Rosenthal, in view of the fact that Mr. Riordan was the bank's [215] counsel.

We all left the room, and Mr. Riordan spoke privately with Mr. Rosenthal.

Q. Now, when you speak of "the boys," you refer to the other officers of the bank who were with you, I take it?

A. Yes—and Mr. Tague.

Q. And prior to that time, did any other conversation with Mr. Rosenthal take place—I mean by that, prior to the time you walked out and left Mr. Riordan with him?

A. Yes, sir; we talked about the matter in a general way.

Q. What was said?

A. I cannot recall the exact words at this time, but I know that Mr. Rosenthal once or twice repeated that he would turn over to the bank his \$20,000 of bonds.

Q. Was there anything else said, that you can recall? A. Yes.

Q. What?

A. Mr. Gassman admitted that he knew something wrong was going on, but that he was merely taking instructions from Mr. Rosenthal.

Q. Mr. Gassman said that to all of you, did he?

A. Yes, sir. [216]

* * *

Mr. Lasky: You have answered.

The Witness: All right.

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): If you cannot separate one conversation from the others——

A. No.

Q. (Continuing): ——just tell us then in general what those conversations were, between you and Mr. Rosenthal, that took place in October, and the first part of November of 1948, beginning in October after your return from your vacation?

A. It was regarding the matter of uncollected funds, on the account.

Q. And what was said with respect to that subject?

A. Well, I told him that we wanted him to quit drawing his checks until we had had an opportunity of clearing the checks that he had deposited.

Q. Well, as a matter of fact, Mr. Reichwein, he was not depositing many checks at that time; he was making payments on account of his indebtedness.

Did you refer to checks which he used to make payments on account of his indebtedness?

A. At that time he was depositing checks in his account.

Mr. Lasky: You were asked the question, whether in the [222] discussion you referred to remittances in the loan department, or whether you were referring to the Commercial Account.

That is what the last question was. You have not answered it.

A. I was referring to the Commercial Account.

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): And only to the Commercial Account—— A. Yes, sir.

Q. ——and not the payments made on account of indebtedness? A. That is right.

Q. When did you get back from your vacation? A. October 18th.

Q. And in your conversations with Mr. Rosenthal, to which you have just referred, you were referring to deposits made after that date, were you not? A. No; deposits made before that date.

Q. As well as after?

A. I could not refer to deposits made after that date.

Q. Well, that is what I asked you—you did not have those discussions with Mr. Rosenthal as soon as you got back in October, on October the 18th, did you? A. Yes, sir, the very first day. [223]

Q. Did anybody in the bank speak to you about the account, as soon as you returned?

A. Yes, sir.

Q. Who was that?

A. Mr. LeRoy and Mr. Royds; and Mr. LeRoy gave me a memorandum regarding the account.

Q. I see. And did Mr. LeRoy and Mr. Royds say anything to you about the account at that time?

A. Yes, sir.

Q. What did Mr. LeRoy tell you about the account at that time, upon your return from your vacation?

A. He said that he had been in touch with Mr. Rosenthal, and that Mr. Rosenthal agreed that after

(Deposition of Henry J. Reichwein.)

October 18th there would be no further checks drawn unless the funds on deposit had actually been collected.

Q. That is, checks drawn against this Commercial Account? A. Yes, sir.

Q. Against deposits made to his credit in that account? A. Yes, sir.

Q. Did Mr. LeRoy tell you anything else with respect to the account in that conversation?

A. Yes.

Q. What did he tell you? [224]

A. He did mention the fact that he spoke to Mr. Rosenthal, and asked him to arrange to have the funds wired to our credit from California.

Q. From what place in California?

A. I cannot tell you the city.

Q. He stated—that is, Mr. LeRoy told you that he had asked Mr. Rosenthal to establish at this bank, a credit in favor of the United Produce Company by wire from some California bank; is that right?

A. No; he said that he asked Mr. Rosenthal, instead of having checks sent in here, that the funds would be placed to our credit out there, and wired in.

Q. So as I understand you, then, Mr. Reichwein, instead of Mr. Rosenthal bringing a check to the bank, in favor of the United Produce Company, and depositing that check to the credit of the United Produce Company, Mr. LeRoy had suggested to Mr. Rosenthal that the bank upon which such checks

(Deposition of Henry J. Reichwein.)

would otherwise have been drawn, should wire the credit to the Merchandise National Bank; is that right? A. Wire the funds?

Q. Yes. A. Yes, sir.

Q. Now, what else did Mr. LeRoy tell you in that conversation, [225] if anything?

A. I know that he mentioned that he had called in Mr. Rosenthal, and covered that matter with him.

Q. That is, Mr. LeRoy mentioned to you that Mr. Rosenthal had come into the bank during your absence—— A. Had been asked to come in.

Q. Had been asked to come in during your absence? A. Yes.

Q. Is that right? A. Yes, sir.

Q. And then you say that Mr. Rosenthal had come in pursuant to that request?

A. Yes, sir.

Q. Did he tell you about the conversation that he had had with Mr. Rosenthal at that time?

A. No, sir, he didn't tell me just exactly what was said in that conversation.

Q. What did he tell you about what had transpired at that time?

A. He told me that he had called in Mr. Rosenthal, and asked him as I told you previously, to arrange to have these funds wired in to the Merchandise Bank, rather than to have checks presented which had to be cleared.

Q. And did you ask Mr. LeRoy at that time to

(Deposition of Henry J. Reichwein.)

what checks [226] for which wires were to be substituted, he had reference?

A. I believe it is in the memorandum.

Q. You have no independent recollection of it?

A. No, sir.

Q. If I were to suggest to you that Mr. LeRoy was referring to checks drawn by Mr. Lofendo to the order of the United Produce Company, upon the East Bakersfield Branch of the Bank of America, would that remind you of what Mr. LeRoy said to you in this conversation?

A. I would not be sure, no, sir.

Q. Do you have any recollection of whether or not Mr. LeRoy mentioned to you in that conversation, Lofendo checks?

A. I believe he did, yes, sir.

Q. What did he say about Lofendo checks; what did he tell you he had told Mr. Rosenthal about Lofendo checks? What you have already stated?

A. Yes.

Q. That the bank wanted the funds wired in?

A. Yes, sir.

Q. Rather than to have the checks presented?

A. Yes, sir.

Q. Now, did he also tell you at that time, Mr. Reichwein, why he had made that request on Mr. Rosenthal? [227]

A. Yes.

Q. What did he say in that connection?

A. He said that he had asked to have the funds wired in, because the United Produce Company

(Deposition of Henry J. Reichwein.)

was drawing checks before the deposits had been collected.

Q. That is, the United Produce Company was drawing against credits established by the deposit to its credit of Lofendo checks, before the funds were collected? A. Yes.

Q. Is that about it? A. That is right.

Q. And he told Mr. Rosenthal that he wanted that practice to stop; is that correct?

A. Yes, sir.

Q. You do not recall at this time any reason that he gave you, any other reason than the one just stated, for making that request upon Mr. Rosenthal?

A. That they were drawing against funds which had not yet been collected?

Q. Yes. A. That is true.

Q. And that was the only reason that he gave you—— A. Yes, sir.

Q. ——for making that request upon Mr. Rosenthal? [228] A. Yes, sir.

Mr. Lasky: Let the record show, of course, that all of these questions have been asked without submitting to the witness, the memo heretofore produced, on those conversations.

Mr. Erskine: That is right.

Mr. Lasky: And when I say “heretofore produced” I mean, produced on the deposition of Mr. Messenger.

Q. (By Mr. Erskine): Now, Mr. Reichwein, I would like to have you take these exhibits that I am

(Deposition of Henry J. Reichwein.)

about to show you, that were identified upon the taking of the deposition of Mr. Messenger as Defendant's Exhibits 20-BBB through the remainder of the exhibits bearing that No. 20, and also the exhibit marked upon the taking of Mr. Messenger's deposition as Defendant's Exhibits Nos. 21-A to 21-E, and I would like to have you tell me the number of checks shown by the exhibits to which I have just referred, deposited to the credit of the United Produce Company—or rather, I will put it this way:

I would like to have you show me the credits to this Commercial Account of the United Produce Company, which consisted of the deposits of checks to that account, during the period commencing with October 2, 1948, [229] the date shown at the top of this sheet, Defendant's Exhibit 20-BBB for identification, to the Messenger deposition. [230]

* * *

Q. And at the time it made such payments generally speaking with a few exceptions the bank was making loans to, new loans to the United Produce Company, the proceeds of which were credited to the account, that is right, is not not?

A. Yes, sir.

Q. You are quite clear that when Mr. LeRoy told you that he had told Mr. Rosenthal that he wanted Mr. Rosenthal to stop drawing against uncollected funds, Mr. LeRoy had no reference whatever to the checks being received by the bank on

(Deposition of Henry J. Reichwein.)

account of payments being made by the United Produce Company to the bank?

A. I will answer that by saying that Mr. LeRoy never called my attention to any uncollected activity except that arising from the deposit of checks to the Commercial Account.

Q. Did you thereafter inquire whether or not there was any uncollected activity, as we have expressed it, in connection with payments being made by the United Produce Company on account of its obligation to the bank?

A. On accounts receivable? [236]

Q. Yes. A. No, sir.

Q. Now, I am not clear on this. You may have told me. As a matter of fact I think you told me this afternoon, that after returning from your vacation you had a conversation with Mr. Rosenthal, that is right, isn't it?

A. I had several conversations, yes, sir.

Q. And that those conversations related only to uncollected activity in the Commercial Account?

A. Yes, sir.

Q. They related in any way to uncollected activity, as you have expressed it, in the payments being made by the United Produce Company on account of its indebtedness to the bank?

A. Yes, sir.

Q. The answer is yes or no.

A. It related only to the deposits to the account.

Q. It related to——

(Deposition of Henry J. Reichwein.)

A. (Interposing): And it did not relate to the accounts receivable collections.

Q. That is right. And you at that time did not check the payments being made by the United Produce Company to the bank on account of its obligation to the bank, that [237] is, after your return from your vacation, in order to determine whether or not such payments represented what you have called "Uncollected Activity"? A. No, sir.

Q. I think you have said that you had several conversations with Mr. Rosenthal after your return on that point; I believe you testified about those conversations, haven't you? A. Yes, sir.

Q. You have told me everything that you can recall about those conversations? A. Yes, sir.

Q. When you told Mr. Rosenthal that you wanted the United Produce Company to stop drawing against uncollected funds did you tell them, as Mr. LeRoy, according to your testimony, said, that you wanted the bank in California to wire such funds to you?

A. Mr. LeRoy had previously told him that.

Q. Did you repeat that to Mr. Rosenthal?

A. I don't recall that.

Q. You may or may not have?

A. Yes, sir.

Q. Do you know whether or not after your return from your vacation any California bank did wire funds to this [238] bank?

A. I don't recall, no.

(Deposition of Henry J. Reichwein.)

Q. What is your best recollection with respect to that point? A. I cannot be sure.

Q. You have no clear recollection either one way or the other? A. No, sir.

Q. But you did tell Mr. Rosenthal that you wanted him to stop drawing against uncollected funds? A. Yes, sir.

Q. That is, you wanted the United Produce Company to stop drawing against uncollected funds, that is correct, isn't it? A. Yes, sir.

Q. Did the United Produce Company stop that activity?

A. Yes; they did, somewhere along the end of the month.

Q. Along——

A. Along the end of October.

Q. ——end of October? A. Yes, sir.

Q. That is, the United Produce Company, commencing along about the end of October drew no checks against the account except against funds that had already been [239] collected?

A. yes, sir.

Q. How long did they continue to do that?

Mr. Lasky: To do what?

Mr. Erskine: Did they continue thereafter to draw only against collected funds?

Mr. Lasky: After what?

Mr. Erskine: After the end of October, towards the end of October, through November.

A. Through the deposits to their commercial account, you mean?

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): Yes, that is right.

Mr. Lasky: There are some double negatives there.

Mr. Erskine: Let me redraft it.

Q. You have stated that commencing towards the end of the month the United Produce Company did comply with the direction given to it by Mr. LeRoy, and thereafter by yourself, to draw only against collected funds? A. Yes, sir.

Q. And what I asked you was, whether or not it continued to draw only against collected funds down to the end, around November 17th to the 20th?

A. May I answer in this fashion, that from that date [240] on their checks weren't drawn against any checks which had been deposited in their account, and which weren't cleared, yes, sir.

Q. Now, when Mr. LeRoy mentioned to you that the checks that he had in mind when he told Mr. Rosenthal while you were away on your vacation that he wanted Mr. Rosenthal, or the United Produce Company, to stop drawing against uncollected funds, were the checks of a man by the name of Lofendo, payable to United Produce Company, was that the first time you had heard of Lofendo in connection with the United Produce Company business?

A. I believe we had received accounts receivable from Mr. Lofendo before that date, but I cannot be sure.

Q. And so far as any discussion between you and any officers of the bank were concerned, was that

(Deposition of Henry J. Reichwein.)

the first time that the name of Lofendo was mentioned? A. Yes, sir.

Q. In your hearing? A. Yes, sir.

Q. Now, I would like to have you look at this Defendant's Exhibit 51, upon the taking of the deposition of Mr. Messenger, that is an exhibit dated January 20, 1948, is it not?

A. Yes, sir. [241]

* * *

A. I shall be glad to identify them for you, if you want me to.

Q. Yes. Whose initials are those?

A. Those are the initials of Frank W. Rudolph, and of Allen LeRoy.

Q. This memorandum states here in the first paragraph:

“We are paying against uncollected funds to prevent overdrafts.”

Now, were you aware, Mr. Reichwein, prior to October 1, 1948, that the bank was paying against uncollected funds in the account of the United Produce Company for that purpose,—to prevent overdrafts?

A. It was not brought to my attention, no, sir.

Q. And you did not, as a matter of fact, know that—— A. No, sir.

Q. (Continuing): ——prior to the date of this memorandum? A. No, sir.

Q. Now, Mr. Reichwein I will call your attention to some handwriting, a notation in handwrit-

(Deposition of Henry J. Reichwein.)

ing appearing at the bottom of this Defendant's Exhibit No. 44 for identification, and I will ask you whose handwriting that is.

Mr. Lasky: Are you trying now to impeach Mr. Messenger? He testified to that.

Mr. Erskine: Did he? [265]

* * *

Q. Prior to November 8, 1948, were you keeping in touch with the United Produce Company account for the purpose of determining the amount of accounts receivable of Alfinito held as collateral, and the amount of the drafts on Alfinito discounted by the bank,—the aggregate of them?

A. Personally?

Q. Yes.

A. No. That duty was delegated to others.

Q. To whom?

A. On the accounts receivable, it was delegated to the Discount Department, and on the drafts, to the Collection Department.

Q. Did they ever call any such facts to your attention prior to November 8, 1948, that you recall?

A. There were several instances, but they again are all a part of the record.

Q. In the memoranda that we have been over?

A. Yes, sir.

Q. This memorandum of November 8, 1948, states that the bank held as collateral and drafts on Feldbaum, an amount [271] aggregating \$184,933.50.

(Deposition of Henry J. Reichwein.)

I take it that particular fact was not called to your attention at that time?

A. That is correct, sir.

Q. And the concentration or so-called concentration, as that term has been used, in the bank of Feldbaum accounts receivable and drafts, was not called to your attention, except as indicated by the memoranda which have been presented and discussed? A. Yes, sir.

Q. And you personally made no inquiry with respect to that point? A. I could not.

Q. Well, you did not? A. I did not.

Q. That was the question.

A. No, I did not.

Mr. Erskine: That is all.

Mr. Lasky: No! Now, the direct examination, or whatever one may wish to call it, has now been completed, and I will defer any examination that I may have until later, in accordance with our previous understanding.

Mr. Erskine: That is agreeable. [272]

* * *

Direct Examination
(Continued)

By Mr. Erskine:

Q. Was there any discussion between you and Mr. LeRoy after your return from your vacation with respect to the fact that certain debit entries on the statement of the Commercial Account of the United Produce Company consisted of checks

(Deposition of Henry J. Reichwein.)

drawn by the United Produce Company to the order of Lofendo, and that certain credit entries made in that statement consisted of checks drawn by Lofendo to the order of United Produce Company? In [277] other words, checks on both sides.

A. I have previously testified that Mr. LeRoy and I spoke about the uncollected funds against which we had been asked to pay on the account of the United Produce Company.

Q. But there was no discussion, as I understand it, between you and Mr. LeRoy after your return from your vacation with respect to checks on both sides, as just mentioned by me?

A. What do you mean, checks on both sides?

Q. Well, the fact that checks drawn by United Produce Company to the order of Lofendo were being debited to the account of United Produce Company, and the fact that checks drawn by Lofendo to the order of United Produce Company were being credited to the account; was there any discussion of that situation?

A. Not that I recall, no.

Q. Between you and Mr. LeRoy——

A. No.

Q. ——after you returned from your vacation?

A. That is right.

Q. I believe you did say the other day, Mr. Reichwein, that after your return from your vacation the sheet which has been marked Defendant's Exhibit 44-B on the [278] taking of Messenger's Deposition was shown to you?

A. Yes, sir.

(Deposition of Henry J. Reichwein.)

Q. And that was shown to you, I take it, immediately after your return from your vacation?

A. Yes, sir.

Q. The date on here, 10-18, is in your handwriting, is it not?

A. I'm not so sure, but I will testify——

Mr. Lasky: Wait a minute. You can only answer one question. Is the date in your handwriting?

A. I'm not so sure that is my date.

Mr. Lasky: All right.

Q. (By Mr. Erskine): The initial under the date is in your handwriting? A. Yes, sir.

Q. What is your recollection with respect to the time at which this memorandum, or this sheet, Defendant's Exhibit 43-B on the Messenger Deposition, was shown to you with relation to your return from your vacation?

A. It was shown to me on the date I returned, October 18th.

Q. Now, Mr. Reichwein, did you yourself notice whether or not, prior to your departure for your vacation, checks drawn by United Produce Company to the order [279] of Lofendo being debited against the account, and checks drawn by Lofendo to the order of United Produce Company, were being credited to the account?

A. Did I notice that?

Q. Yes, sir. A. No, sir.

Q. Did you notice whether or not that was the fact after you returned from your vacation?

A. No, sir.

(Deposition of Henry J. Reichwein.)

Q. I am speaking, of course, of the time from the time of your return from your vacation down to November 17th; you understand that?

A. (No answer.)

Q. The answer is "Yes" to that, Mr. Reichwein, for the Reporter? A. You say, did I notice?

Q. Yes. A. No.

Mr. Lasky: When you were asked that question you understood that he was referring down to November 17th.

The Witness: That is right.

Mr. Lasky: Just so we understand, the question referred to down to November 17th. After that he noticed a lot of things. [280]

Q. (By Mr. Erskine): That was the reason, after November 17th, a lot of facts came to your attention? A. That is right.

Q. But prior to, we will say, November 18th, you did not notice that fact? A. No, sir.

Q. And no one called it to your attention?

A. No, sir.

Mr. Lasky: Prior to November 18th?

The Witness: November 17th.

Mr. Erskine: Prior to November 18th, because that would include the 17th.

Mr. Lasky: No. He noticed it on the 17th.

The Witness: I noticed it on the 17th.

Mr. Erskine: Well, then, say prior to November 17th.

The Witness: Yes.

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): You did not notice that fact? A. That is right.

Q. And no one had called it to your attention?

A. That is right. [281]

* * *

Q. Did you know prior to November 17th, that checks of Lofendo payable to the order of United Produce Company, a large number of those checks, were being used by United Produce Company to apply on account of accounts receivable?

A. No, sir.

Q. Now, I will show you a wire marked Defendant's Exhibit No. 4 in the taking of the LeRoy Deposition, and a translation of that wire marked Defendant's Exhibit No. 4-A upon the taking of the deposition of Mr. LeRoy, and I will ask you if that wire was called to your attention when it was received?

Mr. Lasky: Is that the wire of July 21st—or July 8th?

Mr. Erskine: July 8th, yes.

A. No, sir.

Q. (By Mr. Erskine): That wire was not called to your attention? A. No, sir. [283]

* * *

Q. Was that ever discussed by you with other officers or employees of the bank?

A. I could not discuss it if I did not know about it.

Q. And the same is true of the checks referred

(Deposition of Henry J. Reichwein.)

to in the wire which has been marked Defendant's Exhibit No. 4 on the LeRoy Deposition?

A. What do you mean, the same is true? That I did not discuss it?

Q. That you did not discuss it.

A. Yes, sir; I did not discuss it.

Q. Now, I will call your attention, Mr. Reichwein, to a check for \$22,140, payable to the United Produce Company and signed "Jack's Fruit Company by Jack Oddo," which has been marked Defendant's Exhibit No. 6 upon the taking of the Deposition of Mr. LeRoy, and I will ask you if you had ever had any discussion with any officer or employee of the bank with respect to that check?

A. No, sir.

Q. And that item was never called to your attention? A. No, sir.

Q. And you were never told that the item had been received by your bank, had been presented for payment, [287] and when presented that the item had been rejected? A. No, sir.

Q. And you were never told that thereafter the item was again presented by your bank and then paid? A. No, sir.

Q. In other words, you knew nothing about that item? A. That is right.

Mr. Lasky: Have you finished your questioning of the witness on that subject?

Mr. Erskine: Yes.

Mr. Lasky: You will recall that item took place at a time when Mr. Reichwein was on vacation?

(Deposition of Henry J. Reichwein.)

Mr. Erskine: That is right. I just wanted to find out if he ever knew anything about that item.

Q. I call to your attention, Mr. Reichwein, a debit memorandum which appears on Defendant's Exhibit 21-C on the taking of the Messenger Deposition, as of November 15th, 1948, a debit memorandum in the sum of \$17,516.86; that is an item in that amount with the initials "DM" before it.

A. Yes.

Q. I will ask you whether or not that particular item was ever called to your attention, and whether or not you ever knew about it prior to November 17th, 1948. [288]

Mr. Lasky: Which item is it you are asking about?

Mr. Erskine: This one here (indicating).

A. No, sir; I know nothing of it, and it was never called to my attention.

Q. (By Mr. Erskine): You recall, Mr. Reichwein, that after you returned from your vacation—at least, this is my understanding of your testimony—you were told that Mr. Rosenthal had been advised that the United Produce Company after October 18th should not thereafter be permitted to draw against uncollected funds? A. Yes, sir.

Q. I will ask you, Mr. Reichwein, with particular reference to those instructions given Mr. Rosenthal, whether you do not recall that after your return from your vacation a check drawn to the order of United Produce Company by Jack's Fruit Company for this amount already referred to of

(Deposition of Henry J. Reichwein.)

\$17,512.36, was presented by your bank for payment to the Fresno Branch of the Bank of America, and that payment thereof was refused?

A. I would not know anything about that.

Q. That was not called to your attention at all?

A. No, sir.

Q. To whose notice in the bank would items of this sort, [289] concerning which I have been examining you, the rejection of payment of items—to whose notice would such facts be called?

A. The items would be handled by the Collection Department, who handle all return items.

Q. And the Collection Department, as I understand it, was in charge of Mr.——

A. Koefoot.

Q. ——Koefoot? A. Yes.

Q. And Mr. Koefoot, or no one in the collection department, called this last item of \$17,512.36, or the previous item concerning which I have just been examining you, to your attention?

A. It was not called to my attention.

Q. When, after your return from your vacation, Mr. LeRoy called to your attention the instructions with respect to the United Produce Company of not drawing on uncollected funds, did you pass that word on to Mr. Koefoot of the Collection Department? Did you tell him about it? A. No, sir.

Q. Do you know whether he was told about it?

A. I would not know that. [290]

(Deposition of Henry J. Reichwein.)

Cross-Examination

By Mr. Lasky:

Q. Will you state the first date in 1948 upon which you saw any returned and rejected checks, appertaining to the United Produce Company?

A. November 17, 1948.

Q. And can you state at this time what those checks were? A. Yes, sir.

Q. Please do so.

A. They were three checks of Frank C. Lofendo. [298]

* * *

Q. Now, I call your attention to a question appearing on page 80 of your deposition, on your direct examination, put to you by Mr. Erskine:

“Q. I will ask you, Mr. Reichwein, whether or not you did not know that when United Produce Company made a payment to you on account of accounts receivable recorded in a [302] memorandum accompanying the payment, such payment would be made on certain occasions, in any case with only one check for the aggregate amount of the accounts receivable recorded on the memorandum rather than in separate checks for each such accounts receivable?”

That question appears not to have been answered, because I could not understand it, and I asked to have it read, and still could not understand it.

Mr. Erskine: And I do not understand it now, from your reading of it.

(Deposition of Henry J. Reichwein.)

Mr. Lasky: I could not understand it at the time.

However, on page 82, the matter was taken up again as follows:

“Q. Now, my question is, whether or not you did not know that such check or checks, in many cases, or some cases, were the check or checks of persons other than debtors named in the memorandum, the debtors to the United Produce Company named in the memorandum?”

Then the answer to that appears as follows—well, no, that was not answered, either; and then it was taken up again on page 83, as follows:

“Q. I believe you have testified that [303] payments were made from time to time on account of the indebtedness of the United Produce Company secured by accounts receivable.

“A. Yes, sir.

“Q. And I believe you testified that such payments were accompanied by a statement or memorandum showing the accounts receivable from which such payments had been derived?

“A. Yes.”

Mr. Erskine: Pardon me, but that should be “accounts receivable.”

Mr. Lasky: That is what it is.

Mr. Erskine: I understood you to say “amounts receivable.”

Mr. Lasky: Well, if I did, I misspoke. The record is “accounts receivable.”

(Deposition of Henry J. Reichwein.)

The Witness: Yes, sir.

Q. (By Mr. Lasky): Did you know, before November 17th, 1948, that that was so, or was that your supposition at the time?

A. I supposed that to be the case; I did not know, before November 17th.

Q. Now, I call your attention further to your deposition, at page 222, as follows: [304]

“Q. If you cannot separate one conversation from the others—— A. No.

“Q. (Continuing): ——just tell us then in general what those conversations were, between you and Mr. Rosenthal, that took place in October, and the first part of November of 1948, beginning in October after your return from your vacation.

“A. It was regarding the matter of uncollected funds, on the account.”

Now, Mr. Reichwein, did you have any conversation whatever with Mr. Rosenthal on that subject, the matter of uncollected funds, in November?

A. I would say not, because the matter of uncollected funds on our Commercial Account was cleared up the latter part of October.

Mr. Lasky: Off the record.

(There followed at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: Now for the record.

Q. On page 239 of your deposition, Mr. Reichwein, the following appears:

(Deposition of Henry J. Reichwein.)

“Q. Did the United Produce Company stop that [305] activity?”

That is, talking about drawing against uncollected funds.

“A. Yes; they did, somewhere along the end of the month.

“Q. Along——

“A. Along the end of October.

“Q. ——end of October? A. Yes, sir.

“Q. That is, the United Produce Company, commencing along about the end of October drew no checks against the account except against funds that had already been collected.

“A. Yes, sir.”

Then near the bottom of page 240 of your deposition, the following:

“Q. And what I asked you was, whether or not it continued to draw only against collected funds down to the end, around November 17th to the 20th?

“A. May I answer in this fashion, that from that date on their checks weren't drawn against any checks which had been deposited in their account, and which weren't cleared, yes, [306] sir.”

Now, which of those two was correct?

A. Would you mind reading those two answers over again.

Q. Paraphrasing it, one answer is that the

(Deposition of Henry J. Reichwein.)

United Produce Company, commencing along about the end of October, drew no checks against the account except against funds that had already been collected; and the other answer is that their checks were not drawn against any checks which had been deposited in their account, which were not cleared.

A. That second answer is the one that I would like to adopt, and go by.

Q. All right. Now, were there credits in the Commercial Account, entered, which were neither collected checks nor uncollected checks deposited in that account?

A. I do not understand that question.

Q. Well, were there credits entered in the Commercial Account originating in something other than a check deposited in that account?

A. There were credits to the proceeds of loans, yes, sir.

Q. And discounts? A. Yes, sir.

Q. Draft discounts?

A. Yes, sir—accounts receivable or draft [307] credits.

* * *

Q. From time to time during 1948—and my questions are always addressed to a time prior to November 17th, unless I state otherwise, was there any check-up made to determine promptness of payment by the account debtors of the United Produce Company, of their accounts which had been assigned?

A. Do you mean, accounts receivable?

(Deposition of Henry J. Reichwein.)

Q. Yes. A. Oh, yes.

Q. What sort of a check-up was made?

A. Our Field Auditor called at their place of business approximately every thirty days, and checked the payment record of the Accounts Receivable which were pledged to the bank.

Q. And did the Field Auditor then render reports?

A. Yes, sir, a report was rendered each time a check-up was made.

Q. Were those reports called to your [311] attention?

A. Yes, sir, they were.

Q. Did you rely upon them?

A. Yes, sir, I did. [312]

* * *

Q. Now, Mr. Reichwein, how long have you been a banker?

A. Since 1908, with the exception of three years when I was an instructor in banking and finance at the La Salle Extension University.

Q. What banks have you been with in that period?

A. From 1908 to 1922, with the Fort Dearborn National Bank of Chicago; from 1922 to 1925, as I have explained, I was instructor of banking and finance at the La Salle Extension University; from 1925 to 1933, I was [315] vice-president, for two years, and then was President of the State Bank of West Pullman, Chicago, Illinois, which was until May 30th, 1933; and since June 1st, 1933, I have

(Deposition of Henry J. Reichwein.)

been with the Merchandise National Bank, having started as cashier, later becoming vice-president and cashier, and as I explained, a few years ago the cashiership was handled by somebody else for a period of three or four years, but since the latter part of November, 1948, I was again vice-president and cashier.

Q. How many years have you been with banks which financed produce dealers?

A. Approximately twenty-five years.

Q. Have you been with banks that financed a large amount of items for produce dealers, had a large amount of the business?

A. The Fort Dearborn National Bank of Chicago, handled more produce business, and to a great extent specialized in the handling of that type of business.

Q. What experience have you had in the matter of lending on the basis of assignment of accounts of produce companies and the discounting of drafts of produce companies? For how many years?

A. Over twenty years.

Q. Will you state the type of shipping document which [316] is customarily used in the shipping of perishable produce? State from your experience.

A. From my experience, the order bill of lading was strictly an exception. The documents used in most cases were delivery orders.

Q. Can you state the reason for this usage?

A. Because of the perishable nature of the merchandise. They had to have some form of document

(Deposition of Henry J. Reichwein.)

that would facilitate the handling and eliminate the danger of spoilage, because of the perishable nature, and the delivery order answered that need.

Q. Now, can you state in round figures how many drafts during your years of experience, you have handled the discounting of on perishable produce?

A. That is impossible, but it is in tens of thousands.

Q. What is the customary kind of security taken on the discount of drafts covering shipments of perishable produce, in your experience?

A. A draft is drawn with an invoice attached, and a delivery order.

Q. Accompanying the draft? A. Yes, sir.

Q. For how long had Merchandise National Bank discounted drafts for United Produce Company, prior to [317] November 17th, 1948?

A. Three years.

Q. During that period of time can you state, in round figures, the number of drafts which Merchandise National Bank discounted for United Produce Company?

A. Oh, I would say six or seven thousand.

Q. Along that magnitude? A. Yes, sir.

Q. Let me ask you this question: Were there other customers of this bank for whom you handled the discounting of drafts accompanied by delivery orders? A. Oh, yes; we had several.

Q. Now, getting back to United Produce Company drafts, do you know of any case, any instance, where there was a car covered by a draft which was

(Deposition of Henry J. Reichwein.)

delivered to anyone without Merchandise Bank's releasing the delivery order?

A. Will you read that question, please?

(The question referred to was read by the Reporter as above recorded.)

Q. (By Mr. Lasky): There was no such case?

A. No, sir.

Q. Was there ever a case of a diversion of a car——

Mr. Erskine: Pardon me. I wonder if you would read [318] that last question for me, please.

(The question was read by the Reporter as above recorded.)

Mr. Erskine: Thank you.

Mr. Lasky: I started another question. How far did I get, Mr. Reporter?

(The question was read by the Reporter as above recorded.)

Q. (By Mr. Lasky, continuing): ——without Merchandise Bank's consenting to the diversion and taking a substitute draft in lieu of the first one?

A. Not to my knowledge, no, sir.

Mr. Erskine: That is, as far as you know?

The Witness: As far as I know. I never heard of one.

Q. (By Mr. Lasky): No such instance was ever called to your attention? A. No, sir.

Q. Either before or after November 17th, 1948?

A. No, sir.

(Deposition of Henry J. Reichwein.)

Q. Were there many or few drafts discounted for United Produce Company, accompanied by the delivery orders, which were returned to Merchandise Bank unpaid, of all that were handled for United Produce Company in the three [319] years you have mentioned?

A. You mean, when drafts were refused?

Q. That is what I want to know. Were there many or few?

A. Very, very few. I would say less than half a dozen.

Q. Were all drafts discounted for United Produce Company accompanied by delivery orders, or were some accompanied by bill of lading?

A. I believe most of them, practically all of them, were accompanied by delivery orders.

Q. Were there any unaccompanied by either a delivery order or bill of lading? A. No, sir.

Q. How long has Merchandise National Bank been engaged in financing business, extending loans on the basis of assigned accounts receivable?

A. Since 1933, to my knowledge.

Q. To your personal knowledge?

A. My personal knowledge, and——

Q. How long—pardon me.

A. (Continuing): ——and from a check-up of the records I made when I came in, I know such advances were made since 1933. [320]

Q. For how long has Merchandise National Bank financed business, made loans, and extended

(Deposition of Henry J. Reichwein.)

credit on the security of general assignments of accounts receivable?

A. I believe since about 1945 or 1946, or thereabouts.

Q. What part has Merchandise National Bank played in financing business on the basis of security of assigned accounts receivable?

Mr. Erskine: Pardon me. Would you read that question, please?

(The question referred to was read by the Reporter as above recorded.)

A. We are known as the pioneers of that type of financing by banks in the Chicago area.

Q. (By Mr. Lasky): Will you state from your experience what need there is for this mode of financing?

A. Well, there is definitely a need for this type of financing. There are a lot of firms whose financial condition does not warrant granting any unsecured credit, and the financing of their receivables, or the handling of their receivables, enables the bank to furnish credit where otherwise they could not obtain it, and that is very, very particularly true in the case of a company [321] that is growing, when their need for credit greatly exceeds the amount of credit that a bank could give them on an unsecured basis, and by pledging their accounts receivable they can get, or the bank can give them, more money than they could give them on an unsecured basis.

Q. When Merchandise National Bank embarked

(Deposition of Henry J. Reichwein.)

upon this program of financing business on the basis of assigned accounts receivable, was there any experience relative to procedure, manner of conduct, manner of operation or manner of policing such assignments upon which it could draw in the Chicago area, to your knowledge?

A. You mean with banks?

Q. With banks, is what I mean, yes.

A. No. As I told you, we were the pioneers among the banks in this area for this type of financing.

Q. Did Merchandise National Bank, as it went along with this type of financing, develop and devise its own procedures?

A. Oh, yes, we did, and as different needs arose, different things came up, we naturally revised our set-up and our records and the check-ups we made to cover the new items that we learned as we went along.

Q. Let me ask you this question: Has Merchandise [322] National Bank learned something from its experience with United Produce Company?

A. Is this on the record?

Q. Yes. A. Definitely.

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: I have no further cross-examination. The witness is yours for redirect.

(Deposition of Henry J. Reichwein.)

Redirect Examination

By Mr. Erskine:

Q. According to the practice about which you have been testifying, Mr. Reichwein, a general assignment is an assignment of all accounts receivable to the company being financed to secure its loan, is that right?

A. Yes. That is the general idea.

Q. And when such an assignment is taken, it is also part of the practice to have a field auditor to check the books of the company from time to time, is it not?

A. Yes. The field auditor made checks, whether or not the advances were made on a general assignment or [323] specific assignment.

Q. The field auditor made such a check in either case? A. Yes.

Q. Was it part of the practice to have the field auditor check the accounts receivable on the remittance sheets accompanying payments made by the borrower to the bank, in order to determine whether or not—to make such check of the remittance sheets with the books of the company, in order to determine whether or not the company was remitting all of the receipts received by it on account of accounts receivable covered by the general assignment?

A. That is a long question. May I have it read?

Mr. Erskine: Yes. The Reporter will read it.

(Deposition of Henry J. Reichwein.)

(The question was read by the Reporter as above recorded.)

A. In the first part of that question you refer to accounts receivable. I wonder if you do not mean checks in payment?

Mr. Erskine: Will you read the question again, please, Mr. Reporter.

(The question was again read by the Reporter as above recorded.) [324]

Q. (By Mr. Erskine): Pursuant to your suggestion, Mr. Reichwein, let me ask you this: The practice was for a company borrowing money on such a general assignment to make remittances of amounts collected by it on account of accounts receivable, was it not? A. Yes.

Q. And when such a borrower made such remittances, it accompanied the remittances with a list of accounts receivable collected by it, together with the amount of such accounts?

A. Yes, sir.

Q. The question that I was putting to you was this: Was it your practice to check the accounts receivable, or was it the practice to have the field auditor check the accounts receivable listed on such a remittance sheet, with the books of the company, for the purpose of determining whether the company was remitting all of the accounts receivable collected by it and covered by its general assignment?

A. Whether or not the field auditor used those

(Deposition of Henry J. Reichwein.)

remittance sheets to do his checking, I cannot say; but the field auditor in every case checked the receipts of a borrowing customer to see that all of the funds had been [325] remitted to us which they had received in payment of accounts receivable.

Q. You do not know whether he made a check of the remittance sheets against the books, but you do know that according to the practice he made a check of the books to determine whether or not the customer was remitting all of the funds which he had collected on account of accounts receivable?

A. Yes, sir.

Q. Now, in answer to one of the questions put to you by counsel, you said that practically all of the drafts discounted by the bank—let me put the question to you this way:

In answer to the questions put to you by Mr. Lasky on cross-examination, did you mean to say that practically all of the drafts discounted by the bank for the United Produce Company were accompanied by delivery orders? A. Yes, sir.

Q. And such delivery orders were in the form of the delivery order attached to this bankruptcy claim which was marked for identification upon the taking of Mr. Messenger's deposition as Defendant's Exhibit No. 32, the form to which I refer being the delivery order I [326] am now showing to you which is dated 10/16/48, and it says, "Please deliver to J. Alfinito & Sons, Inc.," signed "Rosenthal," and attached to which is a draft drawn by the United Produce Company upon Alfinito & Sons, Inc., for the sum of \$5,187.50?

(Deposition of Henry J. Reichwein.)

Such delivery orders were in that form, were they not?

A. That is the usual form, yes, sir.

Q. Now, according to the practice you have described, the draft discounted by the bank was accompanied by a delivery order and an invoice——

A. Yes, sir.

Q. (Continuing): ——the invoice being in the form of the invoice attached to the delivery order about which I was just questioning you?

A. Yes.

Q. Now, what was done with the draft, the delivery order, and the invoice, after you had discounted the draft?

A. They were forwarded to a city in which the person on whom the draft was drawn was located, for collection.

Q. To a bank in such city?

A. Yes; or if we did not have a direct correspondent, [327] through some other bank that would contact or notify this person that there was a draft drawn against them.

Q. Were the drafts accompanied by any instructions to such correspondent bank?

A. I know that our usual form of collection letter was sent with such drafts, yes.

Q. Do you have the usual form of collection with you in the bank here?

A. I do not have any here.

Q. Could you get one?

(Deposition of Henry J. Reichwein.)

A. I am sure we could.

Mr. Erskine: Would you please get one, Mr. Messenger?

Mr. Messenger: Yes.

Mr. Erskine: In the meantime, I will go on to something else.

Q. (By Mr. Erskine): Now, in your cross-examination you stated, as I have your testimony written down here, that you do not know of any case when a car covered by a draft discounted by Merchandise National Bank for the United Produce Company was delivered to anyone without Merchandise Bank's releasing the delivery order. That was about what you said, was it not?

A. Yes, sir. [328]

Q. That is, so far as you know that is the case?

A. Yes, sir.

Q. Now, what did you mean in that answer, when you said that such car was not delivered without Merchandise Bank's releasing the delivery order? What did you mean by that?

A. That such a car would not be released until the draft which accompanied it had been paid.

Q. That is, released by the railroad company?

A. No; released by the bank that was handling the collection. When a bank handled the collection and received payment, the delivery order would be released by them.

Q. To the person paying the draft?

A. Yes.

Q. And that is what you meant by that answer?

(Deposition of Henry J. Reichwein.)

A. That is right.

Q. What is, when the draft was paid, the delivery order accompanying it was delivered to the person paying the draft? A. That is right.

Q. Now, Mr. Reichwein, you testified that when a noon-day red balance appeared on the commercial ledger card of the account, on each day on which that appeared during [329] the year 1948 you knew that there was a black balance, is that correct? That is what you testified, as I remember it.

A. Yes.

Q. But you did not know the amount of the black balance, did you?

A. The exact amount, no, sir; I would not know.

Q. When you say "the exact amount," do you mean that you knew the amount within a few hundred dollars?

A. Yes, sir, but not pennies, or anything like that.

Q. Yes. On each occasion when a noon-day red balance appeared on the statement of the commercial account, you knew that the true balance on that day was a black balance, and you knew the amount of such black balance within a few hundred dollars either side?

A. I knew that there would be a black balance, yes, sir.

Q. And did you know the amount of it within that approximation?

A. Oh, it is hard to say within a couple of hundred dollars on an account that ran that large. I

(Deposition of Henry J. Reichwein.)

will say that I knew that we had sufficient deposits to make that a black balance as of that date.

Q. That is, that would be a black true balance?

Mr. Lasky: Yes. [330] A. Yes.

Mr. Lasky: As distinguished from these noon-day things.

The Witness: Yes. That is right.

Q. (By Mr. Erskine): But do I understand your testimony to be that you did not know what the amount of the true black balance would be?

A. The exact amount, I did not know.

Q. Well, the word "exact" puzzles me. What do you mean by that?

A. Well, to the last penny. When we speak of a balance we include pennies.

Q. Yes. Well, to come back to that, Mr. Reichwein, is it a correct statement of your testimony to say that you knew the correct true balance in such cases within, we will say, \$500.00 either side of what the true balance might actually have been?

A. I think that is fair. [331]

* * *

Recross-Examination

By Mr. Lasky:

Q. On cross-examination I asked a question to the effect whether there ever was an instance, in the case of United Produce Company, of any car covered by a draft being delivered to anyone without a release by Merchandise National Bank of the delivery order, and on redirect examination you testified something to the effect, as I got it, that you

(Deposition of Henry J. Reichwein.)

meant that the delivery order was not released to the consignee without the draft being paid. Is that what I understood you to say?

A. Yes, sir; no delivery orders were given up unless the draft was paid. [336]

Q. But now my question is, was the car of merchandise referred to by the invoice which accompanied the draft ever delivered to anybody without the delivery order first being released to the person who obtained the merchandise?

Mr. Erskine: If the witness knows.

A. Not to my knowledge; I never heard of it.

Mr. Lasky: That is what I understood you to testify the first time. That is all.

Redirect Examination

By Mr. Erskine:

Q. When you used the expression "consignee," you meant the drawee of the draft? A. Yes.

Mr. Lasky: I meant the drawee of the draft. That is a much more correct expression.

Mr. Erskine: That is all.

Mr. Lasky: I guess that is all, then.

Mr. Erskine: Yes. That concludes the depositions here.

And further the witness deposed and said not.

(Witness excused.)

/s/ HENRY J. REICHWEIN.

[Endorsed]: Filed May 22, 1950. [337]

[Title of District Court and Cause.]

DEPOSITION OF WILLIAM EDWARD
TAGUE

* * *

Thereupon:

WILLIAM EDWARD TAGUE

called as a witness on behalf of the defendant, having been first duly sworn, was examined upon oral interrogatories, and deposed and said as follows:

Direct Examination

By Mr. Erskine:

Q. What is your full name, please, Mr. Tague?

A. William Edward Tague.

Q. Where do you reside? A. Chicago.

Q. By whom are you employed?

A. Merchandise National Bank.

Q. In what capacity?

A. You are referring to the present time, or to the time in which this case comes?

Q. At present.

A. At the present time I am doing special work in the auditing department.

Mr. Lasky: Pardon me. Before the deposition goes further, I want the record to show that the position we take is that since Mr. Tague is an employee and not an officer of this bank, you cannot take his deposition as that of an adverse party, and cannot ask leading questions, [4*] and are otherwise

* Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of William Edward Tague.)

bound as if he were a stranger to the case; the same position we took with respect to Mr. Koefoot.

Mr. Erskine: I will not make any comment on your observation, but I want it understood that I am not bound by it, of course.

Mr. Lasky: You are not bound by what I say, unless what I say is the law.

Mr. Erskine: I cannot accept that. Will you read the last question and answer, please, Mr. Reporter.

(The record was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): What sort of special work, Mr. Tague?

Mr. Lasky: Now, just a minute. What Mr.—well, I will withdraw my objection.

Mr. Erskine: I want to know what he is doing.

A. I have been working primarily on charged-off assets.

Q. (By Mr. Erskine): Now, in November of 1948, and part of that time, what were you doing for the bank?

A. At that time I was assistant credit manager and chief field auditor.

Q. How long had you been occupying this position? [5] A. Approximately two years.

Q. Are you an accountant by profession, Mr. Tague?

A. No. I have stuck to banking and finance. I happen to know accounting by virtue of my educa-

(Deposition of William Edward Tague.)

tion, but I could not consider myself an accountant since I have never practiced.

Q. How long have you been with banks?

A. I was an examiner for four years.

Q. An examiner for the controller's department?

A. The Pennsylvania Department of Banking.

Q. Before you came to this bank?

A. Yes.

Q. And how long have you been with this bank?

A. Three years. [6]

* * *

Q. What is your recollection, your best recollection, with respect to that matter?

A. I believe I discussed it with Mr. Rudolph.

Q. Did you have any discussion of it with Mr. LeRoy? A. Yes.

Q. Now, this memorandum in the second paragraph states, "Mr. Gassman explained that lots of grapes are purchased by the grower (or agent) for cash."

That is a sentence in the second paragraph. To whom did you refer by the use of that term "grower (or agent)," Mr. Tague?

A. I believe the last sentence in the memorandum covers that.

Q. That is, the sentence reading as follows:

"The foregoing transactions are recorded in the accounts of Mazzie Farms, Fresno, California; Jack's Fruit Company, Fresno, California, and Frank C. Lofendo, Bakersfield, California"?

(Deposition of William Edward Tague.)

Those are the people to whom you referred as "grower (or agent)"? A. Yes. [11]

Q. Will you tell me the conversation between you and Mr. LeRoy with respect to this memorandum?

A. I do not think I would remember that conversation.

Q. Can you remember the substance of it?

A. The substance of it was the explanation as set forth in my report there of what actually happened.

Q. Was there any discussion with reference to what is stated in the second paragraph of the memorandum?

A. To what do you refer, specifically?

Q. The practice described in the second paragraph of the memorandum.

Mr. Lasky: By "second paragraph," you refer to the one which begins, "The company's records reveal that this activity stems from three accounts," and so forth?

Mr. Erskine: That is right, yes.

Mr. Lasky: Your question is whether there was any discussion with Mr. LeRoy about that paragraph?

Mr. Erskine: Yes. That is right.

A. I think only to supplement my memorandum, such questions as he might have had at that time.

Q. (By Mr. Erskine): By that, I understand that such discussion was repetitive of what you said in the memorandum, is that right?

(Deposition of William Edward Tague.)

A. Exactly. [12]

Q. Did Mr. LeRoy make any comment with respect to what you described in the second paragraph? A. Not that I recall.

Q. Was there any discussion between you and Mr. LeRoy at that time with reference to the fact that on the commercial account of the United Produce Company with this bank, checks drawn by United Produce Company to the order of Lofendo were being charged against the account, and on the credit side checks drawn by Lofendo to the order of United Produce Company were being credited to the account?

Mr. Lasky: Just a minute. I did not hear that question because of some commotion at one end of the table. Will you read the question to me, please, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

Mr. Lasky: That is a question that can be answered yes or no.

A. I would say no.

Q. (By Mr. Erskine): There was no discussion with respect to the fact that such checks were on both sides of the account? A. No.

Q. The answer is "No"? [13] A. No.

Q. Was there any such discussion at any time between you and LeRoy?

Mr. Lasky: At any time prior to November 17th?

(Deposition of William Edward Tague.)

Mr. Erskine: Yes. At any time prior to November 17th.

A. No.

Q. (By Mr. Erskine): Did you ever notice that fact in your investigation of the company?

A. No.

Q. You never noticed those checks on both sides of the account? A. No.

Q. The answer is "No"? A. No.

Q. As far as you know, there was no discussion between you and any other officer or employee of the bank prior to November 17th, 1948, concerning that circumstance?

A. There were no discussions of that particular circumstance.

Q. In which you took part?

A. In which I took part.

Q. Now, Mr. Tague, did you make periodical audits of the United Produce Company for the bank? [14] A. Yes.

Q. Do you know whether or not the United Produce Company maintained a book called the cash receipts book? A. They did.

Q. Do you recall the type of items entered by the United Produce Company in such book?

A. I am not certain, but I believe the cash receipts ledger contained only the total of the day's receipts.

Q. Did it set out the debtors—I will withdraw that.

Were you aware, at the time you made these

(Deposition of William Edward Tague.)

audits, that United Produce Company had assigned accounts receivable to the bank as collateral?

A. Yes.

Q. Did that cash receipts book set out payments received from the debtors whose accounts receivable had been assigned to the bank?

Mr. Lasky: I am sorry, but I did not get that question. Will you read it to me, please?

(The question was thereupon read by the Reporter as above recorded.)

A. No.

Q. (By Mr. Erskine): You are quite clear that that is the fact? A. Yes. [15]

Q. Did the names of the debtors making the payments on account of such accounts receivable appear in any record of the United Produce Company examined by you?

A. The accounts receivable, yes.

Q. In what record did United Produce Company record such payments?

A. In the accounts receivable ledger, as a credit.

Mr. Lasky: I understand these questions refer to the books of United Produce Company?

Mr. Erskine: That is right.

The Witness: That is right.

Q. (By Mr. Erskine): In other words, in the accounts receivable register, the names of the debtors whose accounts had been assigned to the bank as collateral, appeared? A. Right.

Q. And the amount owing by them to the United Produce Company? A. Yes.

(Deposition of William Edward Tague.)

Q. Those entries were not made in the cash receipt book of the United Produce Company?

A. Not specifically.

Q. That is, the debtors were not named, but only the aggregate? [16] A. That is right.

Q. The aggregate of daily payments?

A. That is right. [17]

* * *

Mr. Lasky: "By schedule" you refer to——

Mr. Erskine: Schedules in the form of Defendant's Exhibits 29-PP on the taking of the Messenger Deposition, and by remittance sheets, I refer to sheets in the form of Defendant's Exhibits 41-C on the taking of the Messenger Deposition.

Mr. Lasky: I have the same objection to that question on the grounds of ambiguity, that I expressed before.

A. Well, frankly—well, I will just say no.

Q. (By Mr. Erskine): You never noticed that?

A. No.

Q. Did you ever check, in any of your audits of the United Produce Company, the payments shown on the remittance lists in the form of Defendant's Exhibit 41-Z, for example, in order to determine whether or not the remittances specified on such sheets conformed with the payments shown by the books of the Company to have been received from its debtors? A. No.

Q. You never made any check of that sort at any time [21] in connection with these audits?

(Deposition of William Edward Tague.)

A. What do you mean by "of that sort"?

Q. Well, of the nature described in my question, checking the list——

A. Checking lists——

Q. Checking the remittances specified in the list in order to determine whether or not those remittances conformed to the books of the company.

A. That is, the individual remittance?

Q. That is right. A. No.

Q. Or any group of remittances, any individual group of remittances? A. No.

Q. Did you check the schedules in the form of Defendant's Exhibit 29-PP with the books of the company for the purpose of determining whether or not the accounts receivable described in such schedule conformed with the accounts receivable as described on the books of the company?

Mr. Lasky: Do you know what 29-PP is?

A. Yes.

Mr. Lasky: Your "Yes" is in response to Mr. Erskine's question? [22]

The Witness: Yes.

Q. (By Mr. Erskine): Did you make such a check each time you made an audit? A. Yes.

Q. But as I understand you, you did not check the remittance sheets against the accounts receivable for the purpose of determining which of the debtors named on the schedules were making remittances?

Mr. Lasky: That has been answered several times.

(Deposition of William Edward Tague.)

Mr. Erskine: I want to make sure.

A. No.

Q. (By Mr. Erskine): Putting it in the converse order, did you ever check to determine whether or not payments as recorded on accounts receivable on the books of the company, were listed in the payments specified in the remittance sheets?

Mr. Lasky: The same question, over and over again.

Mr. Erskine: No. That is the converse of it.

A. That can be answered either way.

Q. (By Mr. Erskine): What is your answer?

A. I will say yes. [23]

Q. In other words, you did check to determine whether or not payments as shown by the books of the Company to have been received on account of accounts receivable, were specified on the remittance lists? A. Yes.

Q. Or remittance sheets? A. Yes, sir.

Q. On any such check, Mr. Tague, did you discover that payments were shown on the remittance lists which were not shown to have been received on the books of the company? A. No.

Q. You always found that they conformed?

A. Yes.

Q. Now, when you say you checked the payments received on accounts receivable as recorded on the books of the company, with the remittance lists and the record of the company——

A. Wait a minute. I did not say that.

(Deposition of William Edward Tague.)

Q. I understood you to say that you checked the payments received on account of accounts receivable as recorded on the books of the company, with the payments received by the bank as listed in the remittance sheets. Did you? [24]

A. Not specifically.

Q. Oh. There we are coming to the point about which I was going to ask you. What accounts on the books of the company did you check against the remittance sheets?

A. The total receipts in any one day would equal the total of the remittance sheet for that particular day.

Q. The total receipts on any one day as shown by the——

A. Accounts receivable themselves, or the cash receipts, would equal the total on the remittance sheets.

Q. And you made that check, did you?

A. Yes.

Q. Now, to what book of the company did you refer in making that check of the United Produce Company?

A. To the accounts receivable and the cash receipts.

Q. To both ledger sheets showing the accounts receivable and the cash receipts books, is that right? A. Right.

Q. Was that check confined to the total daily receipts on account of accounts receivable received by the Company, and the total amount specified in

(Deposition of William Edward Tague.)

the remittance sheets as having been paid to the bank?

Mr. Lasky: Will you read that question to me, please.

The Witness: Yes. Repeat that, please.

(The question was thereupon read by the Reporter as above recorded.) [25]

A. Let's answer that "Yes."

Q. (By Mr. Erskine): In other words, in making that check, you did not make a check with respect to any specific accounts receivable, but confined yourself to the aggregate daily receipts?

A. No.

Q. Well, what did the check comprise, then?

A. Well, it——

Q. Describe the check you made in that respect.

A. The daily cash receipts as recorded in the cash receipts ledger agreed in all cases with the total receipts as listed on the remittance sheet.

Q. And was that the only point that you checked, Mr. Tague?

A. Wait a minute. I am not through.

Q. Go ahead.

A. The total of that remittance sheet that particular day was tied in with the individual accounts receivable.

Q. On what? On the books of the company?

A. On the accounts receivable ledger.

Q. Yes.

A. To give me a check on their own cash re-

(Deposition of William Edward Tague.)

ceipts. Then their own cash receipts were verified against [26] the total on the remittance sheet for the day, which in turn determined our control balance.

Mr. Erskine: I do not thoroughly understand that. I will have to ask the Reporter to read it back to me slowly, so I can write it down.

(The answer of the witness was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): What is a control balance?

A. The balance on the accounts receivable ledger—I mean on the—yes, our accounts receivable ledger.

Q. That is, you keep a ledger of the accounts receivable assigned as collateral to the bank, do you?

A. Yes; the outstanding balance.

Q. And the balance on that ledger is your control balance, is that right? A. Exactly.

Q. Now, you say, Mr. Tague, that the total of the remittances on a particular day was tied in with the individual accounts receivable on the accounts receivable ledger to give you a check on their own cash receipts. Referring, as an illustration, to Defendant's Exhibit No. 41-Z on the taking of the Messenger Deposition, I will ask you what is the total as shown by that [27] remittance sheet, 41-Z, as the amount remitted by the United Produce Company on account of accounts receivable?

A. \$97,288.32.

(Deposition of William Edward Tague.)

Q. Now, do I understand, just by way of illustration, that you tied in that total with the individual accounts receivable as listed of the company, in order to determine what accounts receivable listed on the books of the Company made up that total?

A. It would work out that way, yes.

Q. So you made a check in order to determine from the books of the company what specific accounts receivable as shown on such books made up the total of the remittances recorded on a remittance sheet?

A. On that particular day, yes.

Q. On that particular day? A. Yes.

Q. Well, do I understand that in order to determine whether or not the total amount received, or total amount remitted on account of accounts receivable as shown by any remittance sheet, was checked by you against the book of the company, the United Produce Company, known as the accounts receivable ledger, for the purpose of determining what specific accounts [28] receivable recorded in the accounts receivable ledger made up the total recorded on the remittance sheet?

A. Yes and no.

Q. Just explain that answer.

A. Let us say that our records on a particular day indicated the receipts, as we have on that particular day, of \$97,000. Their cash receipts would indicate the same figure—their cash receipts ledger, that is.

(Deposition of William Edward Tague.)

Q. As recorded on the cash receipts book?

A. Right.

Q. Yes.

A. An adding machine tape of the posting to the accounts receivable ledger as of the same date should agree with the cash receipts ledger, and in turn with our remittance. If it did not, obviously something was wrong.

Mr. Erskine: I wonder if you would—have you finished your answer?

The Witness: Yes.

Mr. Erskine: Will you read the last couple of sentences please, Mr. Reporter.

(The record was thereupon read by the Reporter as above recorded.) [29]

Q. (By Mr. Erskine): Now, as I understand that answer, the cash receipt book of the United Produce Company would show a figure as of a particular day agreeing with the figure shown on the remittance sheet? A. Yes.

Q. Then you say that an adding machine tape of the posting to the accounts receivable ledger—right there I would like to have the Reporter mark for me a tape attached to Defendant's Exhibit 38-C on the Messenger Deposition, as Exhibit 1 on the taking of Mr. Tague's Deposition.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 1 for identification.)

(Deposition of William Edward Tague.)

Mr. Lasky: Why mark that tape? It is part of the exhibit.

Mr. Erskine: When you referred——

The Witness: I am not referring to that tape.

Mr. Erskine: I am about to ask you that.

Q. (By Mr. Erskine): When you refer to an adding machine tape of the posting to the accounts receivable ledger as of the same date as any remittance would agree with the cash receipts ledger, do you refer to a tape in the form of [30] the tape that has just been marked Tague Exhibit 1 for identification?

A. I refer to a regular adding machine tape which I ran off at the time I was making the audit.

Q. Did you run off that tape that has been marked Tague's Exhibit 1? A. No.

Q. Do you know who did run off that tape?

A. No.

Q. Then as I understand it, you, in making these checks, would add up certain items appearing upon the books of the United Produce Company, is that right? A. Yes.

Q. Would you add up certain items appearing on the cash receipt book, or on the accounts receivable ledger?

A. On the accounts receivable ledger.

Q. You would make that addition in order to determine whether or not the amount of the remittance aggregated the amount of the accounts on the accounts receivable ledger, is that right?

(Deposition of William Edward Tague.)

A. The amount of accounts receivable listed in the accounts receivable ledger.

Q. Would equal the amount of the remittance?

A. Exactly. [31]

Q. Did you compare the amount of your tape with the amount shown as having been—I will withdraw that.

Did you compare the items, or each figure shown on your tape, with each figure shown in the remittance sheet as having been remitted on accounts receivable? A. No. That was impossible.

Mr. Erskine: I ask that the last part of the answer go out as being non-responsive to the question, and argumentative.

Q. (By Mr. Erskine): Did you compare the amount of the accounts receivable as shown in the accounts receivable ledger with the accounts receivable listed in the remittance sheet?

Mr. Lasky: Will you read that question to me, please, Mr. Reporter.

(The question was read by the Reporter as above recorded.)

Mr. Lasky: Of course, that assumes something that is not so, namely, that the items listed on the remittance sheet were necessarily accounts receivable, and something other than what they are supposed to be—remittances. It is an assumption that has prevailed throughout your examination of numerous witnesses. [32]

Q. (By Mr. Erskine): Well, now, to sum this

(Deposition of William Edward Tague.)

thing up, as I understand here—I may be wrong—you did not compare the individual payments as shown by the accounts receivable ledger of the United Produce Company, with the individual remittances shown on the remittance sheets?

A. No.

Q. In checking this remittance sheet, as, for example, Defendant's Exhibit 41-Z, did you notice that the remittance sheets from time to time showed debtors making payments—or rather, that one of the debtors making payments was Lofendo Distributing Company? A. Yes.

Q. Did you notice that the remittance sheets showed that the Lofendo Distributing Company was making payments repeatedly? A. No.

Q. Did you ever compare the amount of any such remittance having been made by the Lofendo Distributing Company with the accounts receivable ledger of the company for the purpose of determining whether or not the ledger showed an accounts receivable in the amount being remitted by Lofendo Distributing Company?

Mr. Lasky: That question has been asked and answered [33] in one form or another several times. A. I answered that.

Q. (By Mr. Erskine): By the answer "No," is that right? Your answer was "No"?

A. I did compare it, naturally, in the run of the tape.

Q. But that is not what——

A. Which we formerly mentioned.

(Deposition of William Edward Tague.)

Q. But that is not what I asked you, Mr. Tague.
Mr. Lasky: I think it is.

Q. (By Mr. Erskine): I am asking you whether or not you compared a remittance not only in amount, but in name, as appearing on the remittance sheet with the accounts receivable ledger for the purpose of determining whether the accounts receivable ledger of the company showed that Lofendo Distributing Company was indebted to the company on account of accounts receivable in the amount shown by the remittance sheet as being remitted and received by the company from Lofendo? A. No.

Q. The answer is "No"? A. No. [34]

* * *

Q. (By Mr. Erskine): Now, Mr. Tague, I want to clear up, not an ambiguity, but something that was unusually involved, even in my own question, particularly the last question that I put to you.

Mr. Lasky: Are you suggesting that the answer was even more involved than the question?

Q. (By Mr. Erskine, continuing): Therefore, I will ask you this: I will ask you whether or not you compared the remittance, the specific remittance shown on the remittance sheet, not only in amount, but in the name as appearing on the remittance sheet, with the Accounts Receivable ledger of the United Produce Company for the purpose of determining whether such remittance, specific remittance, shown on the remittance sheet, was likewise shown in the Accounts Receivable ledger of the Company?

A. No.

(Deposition of William Edward Tague.)

Q. Your answer is "No"? A. "No."

Q. Now, I will ask you, in the second place, Mr. Tague, whether you compared each amount shown on the adding machine tape which you mentioned in your testimony previously, made from the credits in the individual [37] accounts receivable ledger of the United Produce Company, with the individual amounts shown on the remittance sheet relating to payments as of the same day as the day of the payments shown in the individual accounts receivable ledger? A. No.

Q. Now during the recess, Mr. Tague, did you examine these exhibits, Defendant's Exhibits for identification 49-A to 49-G inclusive, upon the taking of the Messenger Deposition?

A. Yes, sir.

Q. All right. Let me ask you a few questions about them, then.

Each one of these exhibits is in the same form, is it not? A. Yes, sir.

Q. And when I say "in the same form" I mean, they have the same list of questions?

A. That is right.

Q. And each question on each list has the same number as the same question on the other lists?

A. Yes, sir.

Q. Question 5 on Defendant's Exhibit 49-A for identification reads: [38]

"Were there delays or failures to settle with bank for collections and credits?"

Mr. Lasky: May I see one of those forms, please.

(Deposition of William Edward Tague.)

Mr. Erskine: Yes.

Mr. Lasky: So that I can follow your questions.

Mr. Erskine: Yes.

Q. And the answer to that question—or rather, let me withdraw that, and put this question to you:

Opposite each question on each of these lists appear the words “Yes” and “No” with a parenthesis before each of those words. A. Yes.

Q. And when you put an X-mark in those parenthesis before either one of those words, you intended to indicate your answer, did you not?

A. Yes.

Q. Now, coming down to the fifth question on the list of questions, “Were there delays or failures to settle with bank for collections and credits?” your answer to that, is indicated on Defendant’s Exhibit 49-A for identification, is “No.”

Will you tell me what investigation you made for the purpose of determining your answer to that question? I might add that Defendant’s Exhibit for identification [39] 49-A refers to the audit made as of 10/25/48.

A. Well, we will have to again go back to the cash receipts, received daily, which were checked against the accounts receivable.

Q. The ledger? A. The ledger.

Q. Yes?

A. (Continuing): And tied back into the amounts which we received daily, which gave us our control.

(Deposition of William Edward Tague.)

Q. And in answering that question, Question No. 5 on the list, you followed the procedure which you have outlined in your previous testimony?

A: Yes, sir.

Q. Now, coming down to 6, Question No. 6, on this list:

“Do majority of receivables”——

Mr. Lasky: Referring to each of the auditor's reports.

Mr. Erskine: Each of the auditor's reports in this group of Exhibits marked 49.

Mr. Lasky: Yes.

Mr. Erskine: Let me start over again.

Q. Question No. 6 says:

“Do majority of receivables pay under invoice terms?”

On Defendant's Exhibit 49-A for [40] identification you have marked the answer to that question as being “Yes.”

Now I would like to have you tell me what investigation you made for the purpose of making that answer, Mr. Tague.

A. We received at the end of each month the complete trial balance, of which you have a copy among your Exhibits there.

Q. Yes?

A. That trial balance was a listing of accounts receivable, and would indicate anything which was past due. It was a rare instance in which anything was past due.

(Deposition of William Edward Tague.)

That, you will find, is covered by Government regulations; they must pay within a certain period of time.

Q. In your reference to a trial balance in your answer just made, Mr. Tague, are you referring to forms similar to Defendant's Exhibits for identification 30-A and 30-B, on the taking of the Messenger deposition? A. Yes.

Mr. Lasky: Show them to him.

Mr. Erskine: Yes.

Mr. Lasky: To make sure that is it.

The Witness: Well, that is it, I am sure—yes, 30-A [41] and 30-B.

Q. (By Mr. Erskine): Does that Exhibit list any accounts receivable as being past due?

A. No.

Q. Did any of those instruments in the form of Defendant's Exhibits 30-A and 30-B, just shown you, Exhibits on the taking of the Messenger deposition, ever indicate that accounts receivable were past due, so far as you can recall?

Mr. Lasky: Will not the documents speak for themselves?

Mr. Erskine: I am asking for his recollection of the facts.

Mr. Lasky: Is his recollection material?

Mr. Erskine: I think it is.

A. I do not remember any having been past due on the regular terms.

Q. (By Mr. Erskine): In determining your answer to Question 6, you relied upon the sheets

(Deposition of William Edward Tague.)

submitted by the United Produce Company to the bank, in the form that I have just shown you, marked Defendant's Exhibits for identification 30-A and 30-B? [42]

A. No, not completely.

Q. What else did you investigate?

A. We always scanned the ledger sheets for anything past due.

Q. In other words, you took a look at the ledger accounts receivable of the company?

A. That is right.

Q. You examined them? A. Yes.

Q. For the purpose of determining whether or not any of the accounts receivable specified thereon were past due? A. Exactly.

Q. Now, the seventh question of these audit reports, in the group of documents marked as Defendant's Exhibits 49 for identification, says:

"Do they have adequate collection follow-up?"

On Defendant's Exhibit 49-A for identification, you answer that question "Yes."

What investigation did you make for the purpose of determining whether or not the United Produce Company had an adequate collection follow-up?

A. That was a verbal investigation, in which I said, "What do you do if an account does not pay within the [43] specified five days?" and I was shown wires, and memos of telephone calls, and all that sort of thing, which would be adequate, in my estimation.

(Deposition of William Edward Tague.)

Q. Yes. That is, you were shown those things, and told those things by employees of the United Produce Company? A. Yes, sir.

Q. To whom you addressed your inquiries?

A. Yes, sir.

Q. On that point? A. That is right.

Q. Now in Question 8 here, in the group of Exhibits marked Defendant's Exhibit 44 for identification, it says:

"Were remittances allocated to proper invoice?"

Now before I come to your answer to that question, show on Defendant's Exhibit 49-A for identification, let me ask you: Does the word "remittances" there refer to the remittances shown on the remittance sheets, the forms of which have been shown you?

A. We do not consider them to be, no, sir.

Q. The expression "remittance" used in that question, had reference to the remittances received by the company [44] itself?

A. That is right.

Q. Now, getting back again——

Mr. Lasky: Just a moment. Let me hear that last question and answer, please, Mr. Reporter.

(The record was thereupon read by the Reporter as above recorded.)

Mr. Lasky: I have no objection to that question so long as it is understood, as I understand it, that

(Deposition of William Edward Tague.)

you are referring to the witness' undersanding of the question.

Mr. Erskine: Of the term used in the question.

Mr. Lasky: That is, the witness' understanding——

Mr. Erskine: Yes.

Mr. Lasky: ——of the term used in Question No. 8.

Mr. Erskine: Yes.

Mr. Lasky: All right.

Q. (By Mr. Erskine): Your answer was a statement of your understanding of the term, as used in the question, was it, Mr. Tague?

A. Yes.

Q. Question No. 8? A. Yes, sir.

Q. Was your understanding of the term "remittances" as [45] used in that question, the same thing as the item based on the tape which you have mentioned, which was added up?

A. No, sir, it would not be the same thing, because in remittances, we are allocating to one individual account.

Q. I see.

A. Rather than a number of accounts.

Q. Now, tell me, Mr. Tague, what did you do in determining whether or not some particular remittance was allocated to the proper invoice.

A. We worked in totals. In other words, if the trial in one month would indicate a certain balance,

(Deposition of William Edward Tague.)

then the trial in the next month should be the balance, less the remittances, plus additions.

Mr. Erskine: Will you let me hear that answer again, please, Mr. Reporter.

(The answer was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): Now, when you refer to the "trial" in one month, you refer to instruments similar to Defendant's Exhibits for identification 30-A and 30-B, which I have shown to you; is that correct? A. Yes, sir. [46]

Q. And when you refer to the balance shown on the trial of one month, you refer to a balance similar to the balance shown on this Defendant's Exhibit 30-B for identification, that is, the figure of \$469,050.13; is that correct?

A. The total of those columns and accounts.

Q. Yes. And in the case of these Defendant's Exhibits 30-A and 30-B for identification, on the taking of the Messenger Deposition, the balance is the amount I have stated; is that correct?

A. Yes, as I remember it.

Q. Now, Mr. Tague, do I correctly understand you to say that in answering question No. 8, already referred to, you just checked the total on what you call the trial balance—or rather, let me put the question this way:

Do I correctly understand you to say that in order to answer this Question No. 8, what you did was to take the total of one month, shown on what

(Deposition of William Edward Tague.)

you have called the trial balance of that month, and that you then deduct from such balance the payments received during that month, and add the additional accounts receivable added during that month?

The Witness: Would you repeat that?

Mr. Erskine: Read it, please. [47]

(The question was thereupon read by the Reporter as above recorded.)

Mr. Erskine: Let me put the question again.

Q. In other words, as I understand you, Mr. Tague, in answering this question No. 8, you took a trial balance similar to these Defendant's Exhibits 30-A and 30-B, which was as of August 28th, 1948, and you deducted from it the payments made on account of the accounts receivable listed thereon during the succeeding month, that is, along somewhere toward the September of 1948, and then you added to it the accounts receivable assigned during the period, from the date of Defendant's Exhibits for identification 30-A and 30-B, to the date of the succeeding trial balance—is that correct?

A. Rather than add to it, the accounts receivable, let us say, I always checked the sales figure, which would be the same thing.

Q. Yes. And is that the investigation which you made in answering Question No. 8, on Defendant's Group Exhibit No. 49?

A. That was one of the checks that I made.

Q. What other check did you make?

(Deposition of William Edward Tague.)

A. It was the normal practice to take a specific account, and do that. [48]

* * *

Cross-Examination

By Mr. Lasky:

Q. Mr. Tague, you are not an officer of the Merchandise National Bank, are you?

A. No, sir.

Q. And you never have been? A. No.

Q. I believe you testified that you had been an Examiner for the Pennsylvania State Banking Department? A. That is right.

Q. When you were employed by the Merchandise National Bank, did you state to the bank your previous experience? A. Yes.

Q. Now, were you assigned the task of making periodic audits of the books of customers of the bank who were borrowing from the bank on the basis of accounts receivable? A. Yes.

Q. And among those whose books you would audit periodically, were the United Produce Company? A. Yes. [60]

Q. And was the purpose of your periodic audit, to ascertain whether or not the debtor was complying with the terms of the arrangement under which credit was being extended to it?

A. Yes, sir.

Q. How frequently did you make audits of the books of the United Produce Company?

A. Approximately every thirty days.

(Deposition of William Edward Tague.)

Q. The audits were field audits? A. Yes.

Q. That is to say, you went to the office of the United Produce Company itself? A. Yes, sir.

Q. And audited its books there?

A. Yes, sir.

Q. Did you have any specific day of the month upon which to call upon the United Produce Company? A. No.

Q. So that the United Produce Company did not know the day when you would call upon it?

A. No, sir.

Q. And then after you made your periodic monthly audit, you prepared a report, did you?

A. Yes, sir. [61]

Q. And are the forms which have just been examined upon, and which have been marked for identification as Defendant's Exhibits 49-A to 49-G, inclusive, the reports which you made during the year 1948? A. Yes.

Q. After you prepared those reports, what did you do with them?

A. I turned them over to Fred Rudolph, Credit Manager, and they were in turn circulated to the officer in charge of the account.

Q. And do those forms and reports, Defendant's Exhibit 49-A and the following letters for identification, on the Messenger Deposition, bear on their face in each case, certain initials?

A. Yes.

Q. What do those initials signify?

(Deposition of William Edward Tague.)

A. That the officer had seen, and presumably read, the report.

Q. Did you use your judgment and experience as an Examiner, to determine what procedures to follow in making your audits? A. Yes.

Q. Were you informed by any superior as to the details, or the methods that you were to pursue in making your [62] audits, or were you left to answer the questions on the forms in such manner as, based on your experience, you deemed appropriate?

A. The first part of the question, I will answer this way: At times I was informed to look for this, or to look for that; it would be said, "We would like you to take a look at this, or at that."

In the second place, the answer to these questions were formulated by me, based upon my audit of what I deemed necessary.

Q. Were there some accounts in the bank which you audited periodically, which were cases of specific assignments rather than general assignments?

A. The majority of the accounts were specific assignments.

Q. And some were general assignments?

A. Yes, sir.

Q. The account of the United Produce Company was a general assignment? A. Yes, sir.

Q. Was the manner of your audit the same, or different, in auditing a customer's books who borrowed on basis of specific assignments, from what

(Deposition of William Edward Tague.)

was done in the case of those who borrowed on the basis of general assignments? [63]

A. On basis of the specific assignments, we checked each item specifically, all credits, and all additions.

On basis of general assignments, we were interested in totals, as tied into cash receipts and sales.

Q. When you say "we," I take it you refer to yourself? A. Yes.

Q. In making the audit?

A. Yes, sir. We usually went on the general assignment, because the volume was so great that a specific assignment was impractical.

Q. Mr. Tague, I show you here a group of checks which appear not to have ever been passed through the bank, which have been marked as Plaintiff's Exhibits 17-A through 17-S, both inclusive, on the taking of the Deposition of Gassman, each on purporting to be a check drawn by the United Produce Company on the Merchandise National Bank, and each one purporting to have on its back a rubber stamp endorsement of the name Frank C. Lofendo, and none of them having any bank stamp on them.

Will you look at these checks, please, and tell me whether or not you have ever seen them before?

(The witness examined the checks.)

A. Yes. [64]

Q. Where did you first see those?

(Deposition of William Edward Tague.)

A. These were the checks which were in Gassman's desk.

Q. When?

A. At the time that this thing blew up, and I went down there as the bank's representative, to sort of ride herd on things.

Q. Well, translating that term into ordinary English language, what did you do?

A. Well, they were in Gassman's desk on the 17th.

Q. Of November—— A. Yes.

Q. ——1948? A. Yes.

Q. You went down to the United Produce Company office that day? A. Yes, sir.

Q. What time of day?

A. About two-thirty.

Q. And some time during that day you say you found that group of checks in Mr. Gassman's desk?

A. Not that day, no, sir—not that specific day.

Q. Oh. Well, when did you find them there?

A. It was several days later. [65]

Q. I see. Now, just a moment. I show you here Defendant's Exhibit 44 for identification, marked on the Messenger Deposition.

Was that a report made by you? A. Yes.

Q. Now, when you answered certain questions that were put to you by Mr. Erskine, I believe you testified that one of the reasons for your making an investigation upon the basis upon which you prepared that report, was, if I get your testimony correctly, because of the high volume of checks,

(Deposition of William Edward Tague.)

or business being done. I ask you now: Done where; in what account at this bank?

Was it the Commercial Account that you were referring to? A. Yes, sir. [66]

* * *

Q. All right. Now, when you made your audit, did you compare—I just want to be sure that I understand your testimony—the total cash receipts as shown on the books of the United Produce Company, with the tape of the postings of the Accounts Receivable Ledger? A. Yes, sir.

Q. And with the daily remittance totals?

A. Yes, sir.

Q. Did you find that they reconciled, or compared? A. Yes, sir, always.

Q. At the time you were making your audits and investigations of the United Produce Company books, did you know that the books of the United Produce Company were “doctored” books?

A. Definitely not.

Q. Or that they were fictitious?

A. Definitely not, no, sir. It was one of the best kept sets of books that I ever saw in my life.

Q. And they deceived you? [68]

A. (Witness nodding head affirmatively.)

Mr. Erskine: Well, now, just a moment. I think that is not proper cross-examination, calling for his conclusion. He says he did not know that they were fictitious.

Mr. Lasky: Well, you have your objection, and the witness answered by a nod of his head.

(Deposition of William Edward Tague.)

Now will you give your answer so that the Reporter can get it. The question was: "They deceived you?"

A. I did not know that they were "doctored" books.

Q. (By Mr. Lasky): And you were deceived?

A. Yes, sir.

Q. Did you know, at the time you were making your audit and investigation, that there were any invoices in the records of the United Produce Company which were fictitious?

A. No, sir.

Mr. Erskine: Now, just a moment. That assumes something that is not in evidence, that there were any invoices in the records of the United Produce Company that were fictitious.

Mr. Lasky: Do you deny that fact? [69]

Mr. Erskine: Well, can we agree that there were fictitious entries in the books of the United Produce Company?

Mr. Lasky: Can I agree?

Mr. Erskine: Yes.

Mr. Lasky: I know of no reason why we cannot agree, if we get together on it.

Mr. Erskine: Well, it might facilitate the trial of this case, if we could reach a stipulation with respect to that.

Mr. Lasky: Upon the basis of what everybody has discovered since November 18th, 1948, I do not see any reason why we cannot agree to a thing like that.

(Deposition of William Edward Tague.)

Mr. Erskine: Well, do you have some sort of stipulation in mind?

Mr. Lasky: I have not up to this point tried to formulate anything, no, but I do not see any reason why we cannot, because apparently you take the position, just as we take the position, that that is a fact.

Mr. Erskine: That is what we have assumed.

Mr. Lasky: Yes.

Mr. Erskine: And I think it is probably the fact.

Mr. Lasky: Well, we know it to be a fact now.

Mr. Erskine: Yes. [70]

* * *

Redirect Examination

By Mr. Erskine:

Q. You referred to the officer in charge of the account, that is, the United Produce Company account. You knew that was Mr. Reichwein, did you not? A. Yes, sir.

Q. You stated that where there was a specific assignment of accounts receivable, you checked the remittances received by the bank on account of such accounts against the specific accounts receivable assigned, but when there was a general assignment of accounts receivable, you checked only the totals. That is right, is not not? A. Yes.

Q. But when there was a general assignment of accounts receivable, you did make, as I understood your testimony, from time to time a random check

(Deposition of William Edward Tague.)

of specific accounts receivable against remittances—
or, let me put it the other way: You did make a
random check of the remittances against the specific
accounts receivable; is that correct?

A. I made a check of the total remittances
against specific accounts receivable, but not the individual
remittances.

Q. That is, as explained in your direct testimony? [74] A. Yes, sir.

Q. The answer to that question then is "Yes"?

A. Yes, sir.

Q. You said you were sent down to the offices
of the United Produce Company at two-thirty on
November 17th. Who sent you down to that office
at that time? A. Mr. Rudolph.

Q. And what did he tell you at that time?

A. He said, "Go down to the United Produce
Company and meet Arthur Royds down there."

Q. And did you meet Arthur Royds down there?

A. Yes.

Q. Did Mr. Rudolph say anything more than
that?

A. I think he said, "There is trouble there,"
or something to that effect. Naturally, he was not
going to talk over the 'phone.

Q. And you met Mr. Royds? A. Yes.

Q. Did Mr. Rudolph say anything more at that
time? A. No.

* * *

[Endorsed]: Filed April 14, 1950. [75]

[Title of District Court and Cause.]

DEPOSITION OF ARTHUR V. ROYDS

* * *

Mr. Erskine: Will you swear the witness, please?

Thereupon:

ARTHUR V. ROYDS

called as a witness on behalf of the Defendant, having been first duly sworn, was examined upon oral interrogatories, and deposed and said as follows:

Direct Examination

By Mr. Erskine:

Q. What is your full name, please, Mr. Royds?

A. Arthur V. Royds.

Q. Your residence?

A. In Downers Grove, Illinois.

Q. Are you an officer of the Merchandise Bank?

A. Yes.

Q. How long have you been an officer?

A. I think about twelve years; I'm not just sure.

Q. What is your present office?

A. Assistant Vice President.

Q. How long have you occupied that office?

A. For about three years.

Q. Do you work in any particular department of the bank?

A. I am in the Loaning Division now.

(Deposition of Arthur V. Royds.)

Q. Loaning Division? A. Yes. [4*]

Q. Is there such a department of the bank as the Collection Department? A. Yes.

Q. Are you in charge of that department of the bank? A. No.

Q. Were you in charge of it in 1948?

A. No.

Q. Did you have anything to do with it?

A. No.

Q. There is a department known as the Discount Department, is that right? A. Yes.

Q. Have you had anything to do with the Discount Department of the bank?

A. Yes. I was the manager.

Q. Of that department? A. Yes.

Q. You were manager—— A. In 1948.

Q. For the last four years you have been the manager of the Discount Department of the bank, the Merchandise Bank?

A. Well, up until early this summer; I am no longer the manager of it. [5]

Q. Prior to this summer you had been for a period of about four years?

A. No. Longer than that.

Q. How long?

A. I would say about 1937.

Q. Now, as the manager of the Discount Department, what do your duties include, Mr. Royds?

A. Well——

Q. Just generally speaking.

(Deposition of Arthur V. Royds.)

Mr. Lasky: You mean, what did they include in 1948?

Mr. Erskine: Yes.

Q. (By Mr. Erskine): What did they include in 1948?

A. Well, I believe the manager is responsible for the operations of the department.

Q. And what does the——

Mr. Lasky: I move to strike the answer out as not responsive. He was not asked what he was responsible for. He was asked what his functions were, what he did.

Mr. Erskine: Let me ask you this:

Q. (By Mr. Erskine): As manager of the Discount Department, were you responsible for the operations of that department? A. Yes. [6]

Q. And what were your duties as such manager? What did you do in connection with the supervision of the operations of the department? I am referring, now, to 1948.

A. Well, I supervised the various functions within the department.

Q. What do those functions include?

A. Well, they included the handling of commercial loans of all types, the keeping and maintaining of collateral records, purchasing and selling of securities, and we also handled withheld taxes and minor operations.

Mr. Erskine: Now, I might state for the record that I am putting these questions for the same general purpose about which I was examining Mr. Messenger a few minutes ago.

(Deposition of Arthur V. Royds.)

I am about to put certain questions to the witness for the purpose of identifying checks paid to the Merchandise Bank on account of collateral assigned to the Merchandise Bank—that is, accounts receivable assigned to the Merchandise Bank as collateral by the United Produce Company to secure its loan. I say that for your information, Mr. Lasky.

I may be wrong about the method which can be used to identify those checks, but I have a method outlined here, and I would like to follow it to [7] see if what I believe to be the case is the case.

Q. (By Mr. Erskine): Now, Mr. Royds, when a check was brought into your department, the Discount Department, during the year 1948, to apply on accounts receivable assigned to the Merchandise Bank to secure the loan of the United Produce Company, that check was first of all delivered to a teller in your department, was it not?

A. That is right.

Q. Then that teller would enter the check on a register or a record as a credit to the account of the United Produce Company?

A. Not the check.

Q. Not the check, but an entry of the amount of the check, an entry of the credit based on the check?

A. The remittance sheets were used as the method entering them.

Q. The what sheets?

A. Remittance sheets.

(Deposition of Arthur V. Royds.)

Q. Were used as a method of entering them. What do you mean by that, exactly?

A. Well, the actual entering on the records was done through the medium of the remittance sheet which might include not only one check, but several checks. [8]

Q. When referring to a remittance sheet, do you refer to a paper like Defendant's Exhibit 41-A?

A. Yes.

Q. On the Messenger deposition, that is?

A. Yes.

Q. Now, you would take a remittance sheet similar to the sheet, Defendant's Exhibit 41-A on the Messenger deposition, and you would make an entry on the basis of that sheet, would you?

A. (No answer.)

Q. You have to answer so the reporter can hear you.

A. Yes. I am sorry.

Q. And such an entry would be made in some book of original entry kept by the bank?

A. We have what is known as a subsidiary ledger on the receivable loans, in which that entry would be made.

Q. And such an entry would be made on that ledger?

A. Yes.

Q. Then what would be done with that item? What would be the next step in the procedure dealing with that particular item?

A. Do you mean "checks" by "item"?

Q. Yes; checks.

A. Well, we have sort of reversed the procedure

(Deposition of Arthur V. Royds.)

here. [9] I mean, the first step would be to balance up the checks. They would be run on a sheet and balanced against the remittances.

Q. Against the remittance sheet?

A. The remittance sheets.

Q. Then what would be done with them?

A. The checks would then be sent up to the Proof Department, and the remittance sheet retained in the Discount Department as a posting medium.

Q. And what would be done in the Proof Department?

A. I have no knowledge of what they did with them in the Proof Department.

Mr. Lasky: I may say—off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Q. (By Mr. Erskine): Then the remittance sheet itself, you say, was kept in the department for posting purposes? A. That is correct.

Q. And to what would you post from the remittance sheets?

A. To the subsidiary ledger sheets.

Q. In the case of checks received on account of accounts receivable assigned to the bank by [10] the United Produce Company, the entries made on the subsidiary ledger sheet would show credits to the account of the United Produce Company for such payments, wouldn't they?

(Deposition of Arthur V. Royds.)

A. They were deposited in what we call the cash collateral account.

Q. That is a title in the subsidiary ledger sheet?

A. I believe it is headed up "Payments," and on our general ledger we carried an account, "Payments on assigned account loans."

Mr. Lasky: Those ledger sheets, of course, are all here, and they were brought in on Mr. Messenger's deposition.

Q. (By Mr. Erskine): Without trying to trace these steps, would you tell me, Mr. Royds, how the checks received by the bank on account of accounts receivable assigned to the bank by the United Produce Company, can be identified? That is, how can we tell whether such checks were checks drawn by a man by the name of Lofendo, or somebody else, from the records of this bank?

Mr. Lasky: How you can do it now?

Mr. Erskine: Yes.

Mr. Lasky: Is that it?

Mr. Erskine: Yes. [11]

A. There is no way that I know of that you can do it now.

Q. (By Mr. Erskine): Do those checks appear on any Recordat?

A. That is outside of my scope. That is handled in the Proof Department, and I am unable to answer.

Q. Who handles—what officer or employee of the bank in the Proof Department could respond to such questions?

(Deposition of Arthur V. Royds.)

Mr. Lasky: How does he know that?

Q. (By Mr. Erskine): If you know.

A. At the present time I do not know who is in charge of the Proof Department.

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Q. (By Mr. Erskine): Now, Mr. Royds, I will show you an exhibit that was introduced in evidence upon the taking of this deposition, Exhibit 29-PP on the taking of Mr. Messenger's deposition. You are familiar with such sheets, are you not?

A. Yes.

Q. They represent schedules of accounts receivable [12] assigned by the United Produce Company to the bank as collateral for its loan? A. Yes.

Q. Now, I will show you that this sheet is dated October 30, 1948; that is correct, is it not, still referring to this Exhibit 29-PP which was marked on Messenger's deposition?

A. Yes; that is correct.

Q. I will call your attention to the fact that that sheet lists as debtors of accounts receivable, which are listed on the sheet, Lofendo Distributing Company. A. Yes.

Q. Now, Mr. Royds, during this period of time, let's say from July 1st down through October, many such schedules of accounts receivable were delivered to the bank by the United Produce Company?

(Deposition of Arthur V. Royds.)

A. Yes.

Q. You examined such schedules when they were delivered to the bank, did you not?

A. I did not.

Mr. Erskine: Will you read the question to the witness, please, Mr. Reporter, to save repetition?

(The question of counsel was thereupon read by the Reporter as above recorded.) [13]

A. No. I did not examine the schedules in all cases.

Q. (By Mr. Erskine): Did you take a look at them occasionally? A. Yes.

Q. Now, referring to this Defendant's Exhibit 29-PP, did you notice on this schedule or any similar schedules filed with the bank during that period of time, July 1st, 1948, to November 17th, 1948, that the United Produce Company was including in its schedules the name of Lofendo Distributing Company as one of the debtors of its accounts receivable?

Mr. Lasky: You are asking him whether, during that period, he knows?

Mr. Erskine: Yes.

The Witness: What was the period, please? July to when?

Mr. Erskine: July 1, 1948, to November 17th.

A. Yes.

Q. (By Mr. Erskine): You noticed, as a matter of fact, during that period, Mr. Royds, that that

(Deposition of Arthur V. Royds.)

name, Lofendo Distributing Company, appeared very frequently on such schedules?

A. Not very many.

Q. Well, I will call your attention to these [14] two sheets, the sheet marked Defendant's Exhibit 29-NN and Defendant's Exhibit 29-PP, and I will call your attention to the fact that the name Lofendo Distributing Company appears in the list of debtors on those two schedules many times relative to the number of debtors named in both of those sheets.

Mr. Lasky: Whether it does or does not is a deduction to be drawn from what appears there. The witness looks at the sheets and sees the sheets there.

Q. (By Mr. Erskine): Do you notice, upon looking at those sheets, the name Lofendo Distributing Company, Mr. Royds? A. Yes.

Q. And you noticed on similar sheets or similar schedules of accounts receivable assigned to the bank by the United Produce Company, the name appeared on the schedules sometimes frequently repeated on the same schedule?

Mr. Lasky: You are asking whether he notices it now, or he did during that period?

Mr. Erskine: During that period.

A. No, I didn't, during that period.

Q. (By Mr. Erskine): As I understand your testimony, you did notice [15] during that period that the name of Lofendo Distributing Company

(Deposition of Arthur V. Royds.)

appeared as one of the debtors of the accounts receivable?

A. My testimony refers directly to towards the end of the period. You are covering a large period there.

Q. Yes. Well, what do you mean by the end of the period, Mr. Royds?

A. The schedules which you exhibited to me, which are dated late in October, and those submitted in November, I believe, are the only ones you will find with a preponderance of Lofendo accounts on them.

Q. But when you saw those sheets late in October, did you notice the preponderance of Lofendo accounts at that time? A. Yes.

Q. Now, Mr. Royds, I show you an exhibit that has been marked No. 41-BB upon the taking of the deposition of Mr. Messenger, and I will ask you what that exhibit is, according to your understanding.

A. This is what I have referred to previously as a remittance sheet.

Q. That is a remittance sheet on a list of payments being made by the United Produce Company to the bank on account of the accounts receivable assigned to the bank as collateral? [16]

A. Yes.

Q. Now, I will call your attention, Mr. Royds, to the fact that this particular remittance sheet—let's call it a list of payments, if it is all right.

Mr. Lasky: Let's not call it a list of payments.

(Deposition of Arthur V. Royds.)

Mr. Erskine: All right.

Mr. Lasky: Let's call it what it is, a remittance sheet.

Mr. Erskine: You see, I am always amenable to the suggestions made by my colleague, Mr. Lasky.

Mr. Lasky: I object to designations which are inaccurate and which could only be designed to lead to inaccuracies in the record.

Mr. Erskine: It would not lead to such inaccuracies, as far as I am concerned, but I am perfectly willing to call them remittance sheets.

Q. (By Mr. Erskine): Referring to this remittance sheet, Defendant's Exhibit 41-BB, I will ask you if it is not a fact that the last four items on that remittance sheet refer to payments made by United Produce Company on account of the accounts receivable assigned by it to the bank as collateral, and that the items preceding those last four items refer to another matter.

A. May I hear the question again? [17]

Mr. Erskine: Yes. The Reporter will read the question.

(The question was thereupon read by the Reporter as above recorded.)

Mr. Lasky: Will you substitute "remittance" for "payment" in your question?

Mr. Erskine: Yes.

A. Mr. Lasky, I don't see how I could answer that question——

(Deposition of Arthur V. Royds.)

Mr. Erskine: Erskine.

The Witness: Or Erskine; excuse me. I do not see how I could answer that question without referring to the records. The way you worded it—

Mr. Erskine: Well—pardon me. Go ahead.

The Witness (Continuing): —you asked me if it is not a fact, and I certainly do not recall what happened in October, nor could I tell you without referring to the records. [18]

* * *

Q. During this period from July 1, 1948, to November 17th, 1948, did you have, in the course of the performance of your duties for the bank, any knowledge of the Commercial Account of the United Produce Company during that period—that is, whether or not that Commercial Account showed a black balance or a red balance on the debits or credits to it? Did you have any such knowledge during that time? A. On occasion, yes.

Q. You say on occasion. On what occasions, Mr. Royds?

A. The bookkeeping department would, on occasion, contact me to see if a new loan had been granted that day, if a credit was coming through.

Q. Was it your department which handled the new loans which were made from time to time by the bank to the United Produce Company?

A. On accounts receivable.

Q. On accounts receivable? A. Yes.

Q. And at that time when such new loans were

(Deposition of Arthur V. Royds.)

made, the United Produce Company would execute notes to the bank [24] to evidence the loan, and they would then furnish the bank with a list of additional accounts receivable, would they not?

A. That is right.

Q. And, as I understand it, from time to time the bookkeeping department would inquire whether such loans had been made as a source of credits to the Commercial Account of the United Produce Company, is that right? A. Yes; that is true.

Q. Would the bookkeeping department at that time mention to you whether there was any overdraft in the Commercial Account?

A. That would be the reason for contacting me.

Q. Did they mention it to you on those occasions? A. Yes.

Q. Were those fairly frequent occasions during the period from July 1st to November 17th, 1948?

A. Not to my knowledge.

Q. Did you have any knowledge of the checks being debited to the account of the United Produce Company, in its Commercial Account, which were creating the overdrafts in that account, any overdrafts that may have existed in that account?

Mr. Lasky: Just a minute. That question assumes something. [25] It assumes there are overdrafts, unless you are referring to what we have been calling noon-day overdrafts.

Mr. Erskine: Yes; the noon-day red balances.

The Witness: Will you read the question, please?

(Deposition of Arthur V. Royds.)

(The question was thereupon read by the Reporter as above recorded.)

Mr. Erskine: That is, the noon-day red balances.

A. I had no knowledge concerning that.

Q. (By Mr. Erskine): Did you, Mr. Royds, have knowledge of the payments being received by the bank as shown in the remittance sheets similar to Exhibit 41-BB on the Messenger Deposition?

I think you have already testified to that, but I have another point in mind.

A. Your question is not quite clear, or else I do not understand it.

Mr. Lasky: I do not understand it either.

Mr. Erskine: What is that?

Mr. Lasky: I say, I agree with the witness in not having understood it.

Mr. Erskine: Then I am sure it was not clear.

The Witness: Would you—all right. If you would [26] read the question, maybe we could——

Mr. Erskine: That is all right. I will re-frame it.

Q. (By Mr. Erskine): This comes back to the same thing about which I asked you, but it is preliminary. The remittance sheets similar to Defendant's Exhibit No. 41-BB upon the taking of the deposition of Mr. Messenger, show remittances received by the Bank on account of the accounts receivable held by the bank as collateral, do they not? A. Yes.

(Deposition of Arthur V. Royds.)

Q. Now, when those remittance sheets were received, checks of the debtors specified in the remittance sheets, debtors making payments on account of accounts receivable, were received with the sheets, were they not? A. Yes.

Q. Now, during the period of July 1, 1948, to November 17th, 1948, did you notice that checks of Lofendo, payable to the order of United Produce Company, were among the remittances being received by the bank with the remittance sheets filed with the bank during that period?

A. I saw neither the checks nor the remittance sheets, Mr. Erskine. I think that answers your question.

Q. Who would see them, in your [27] department?

A. The bookkeeper and the teller that waited on them.

Q. Was it ever called to your attention, during that period from July 1st to November 17th, that many checks of Lofendo were being received as remittances at the time remittance sheets were filed with the bank?

A. No. It was never called to my attention.

Q. And during that period of time you never noticed that, is that right?

A. I did not see the sheets.

Q. And you did not have any discussion with any other officer or employee of the bank during that period with respect to the fact that many checks, aggregating large sums, were being received

(Deposition of Arthur V. Royds.)

as remittances accompanying remittance sheets, checks of a man by the name of Lofendo?

Mr. Lasky: That has been asked and answered just a minute ago.

A. No. I——

Mr. Erskine: This refers to discussion.

A. I did not have any such discussion.

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.) [28]

Q. (By Mr. Erskine): Now, Mr. Royds, do you remember whether, during the period from July 1, 1948, down to November 17, 1948, any checks received by the Discount Department of the bank for application on account of accounts receivable assigned by the United Produce Company to the bank, were rejected upon the presentation of such checks to the banks upon which they were drawn?

A. Do I remember?

Q. Yes.

A. I was informed of that the day of the 17th.

Q. That was the first——

A. A few minutes before two o'clock I was shown the wire.

Q. Do you refer to this wire, a photostatic copy of which I am now showing to you, Defendant's Exhibit 9 for identification upon the taking of the deposition of Mr. Messenger?

(Deposition of Arthur V. Royds.)

A. I do not remember, nor do I think I could identify the particular wire, Mr. Erskine.

Q. Was that the first time that you heard of rejected checks that had been presented to the bank by the United Produce Company for application on account of accounts receivable assigned by that company to the bank as [29] collateral?

A. Yes.

Q. I will show you a wire here which has been marked Defendant's Exhibit No. 4 on the LeRoy Deposition, together with a translation of that wire which has been marked Exhibit No. 4-A, and I will ask you to take a look at those wires and tell me whether or not you ever saw the wire before?

A. No. I have no recollection of seeing this wire.

Q. Did you ever have any knowledge of the fact that the checks referred to in this wire, the check for \$25,000, and another for \$20,960, were presented to this bank by the United Produce Company for application on account of collateral assigned to the bank, accounts receivable assigned to the bank, and that these checks upon presentation to the bank upon which they were drawn were rejected?

A. No. I had no knowledge.

Q. Would not such a fact be called to your attention, as the manager of the department?

Mr. Lasky: Your question, of course, assumes that the checks were remitted to the Discount Cage and not placed in the Commercial Account.

(Deposition of Arthur V. Royds.)

Mr. Erskine: That is right, and that is our information. [30]

Q. (By Mr. Erskine): Passing for a moment to another subject, Mr. Royds, I will call your attention to a check here that has been marked Defendant's Exhibit 6, a check dated September 18, 1948, which I am quite positive is No. 6 on the LeRoy Deposition, a check signed by Jack Oddo, and I will ask you whether or not you have any recollection of that check.

A. What do you mean by "recollection," Mr. Erskine? You mean, recollection of ever seeing it?

Q. Yes.

A. No. I have no recollection of ever seeing it.

Q. Now, I will call your attention to the fact, Mr. Royds, that Defendant's Exhibit 4-R on the taking of the Messenger Deposition, a remittance sheet, refers to an accounts receivable of Jack's Fruit Company in the amount of \$22,140?

A. Yes.

Q. Does the fact that the remittance sheet just shown you contains that item, and that this check, Defendant's Exhibit 6 for identification, is made payable to the United Produce Company and bears the stamp of the teller of this bank, "Return September 28th, 1948"; does that bring home to your knowledge, Mr. Royds, that [31] the check was delivered to the bank as a remittance accompanying the remittance sheet just referred to?

A. Well, the similarity of dates and similarity of amounts would indicate that.

(Deposition of Arthur V. Royds.)

Q. Would indicate that——

Mr. Lasky: I move to strike that out because that is merely the witness' inference, which the rest of us can make, as well as the witness. You asked for the witness' knowledge.

Mr. Erskine: Yes.

Mr. Lasky: Does it, in fact, refresh his recollection whether he ever saw the check?

Q. (By Mr. Erskine): Or does it, in fact, refresh your recollection with respect to the fact that the check was received as a remittance with a remittance sheet, No. 40-R?

A. I have previously answered that I have no recollection of ever seeing the check. Is this the same question?

Q. Yes; it is substantially the same. You have no recollection of the item at all, is that right?

A. That is correct.

* * *

[Endorsed]: Filed April 14, 1950. [32]

[Title of District Court and Cause.]

DEPOSITION OF RAYMOND L. REDHEFFER

* * *

Direct Examination

By Mr. Erskine:

Q. Now, did you ever have any discussion with any officer or employee of your bank prior to November 17, 1948, in which——

(Deposition of Raymond L. Redheffer.)

A. Prior to what date?

Q. November 17, 1948—in which something along this line was stated, that it had been called to the attention of such officer or employee that the United Produce Company might be engaged in a kite? Was there anything [10*] of that sort ever said to you by an officer or employee of the bank——

A. Positively not.

Q. (Continuing): ——prior to November 17th, 1948?

A. Positively not. [11]

Q. Prior to that date, Mr. Redheffer, did any officer or employee of the bank say to you something along this line, that such officer or employee believed that the United Produce Company might be engaged in business transactions which were not bona fide, and which might be fictitious transactions?

Was any such statement ever made to you?

A. Never.

Q. Nothing along that line? A. Never.

* * *

[Endorsed]: Filed April 14, 1950. [12]

* Page numbering appearing at top of page of original Reporter's Transcript.

[Title of District Court and Cause.]

DEPOSITION OF SAM GASSMAN

* * *

Mr. Erskine: Will you swear the witness, please, Mr. Reporter.

Thereupon:

SAM GASSMAN

called as a witness on behalf of the defendant in the above-entitled cause, having been first duly sworn, was examined upon oral interrogatories and deposed and said as follows:

Direct Examination

By Mr Erskine:

Q. What is your name?

A. Sam Gassman.

Q. You have already testified by way of deposition in this litigation? A. Yes, sir.

Mr. Erskine: Mr. Lasky, if you will permit, I will ask him a few leading questions, and then you tell me when you want me to stop.

Q. You testified, as I recall your testimony——

Mr. Lasky: As long as it is just identifying papers, go ahead and lead.

Mr. Erskine: Yes.

Mr. Lasky: But when you get beyond identification, do not. [3*]

Q. (By Mr. Erskine): The remittance sheets now being shown you, which are only part of the

(Deposition of Sam Gassman.)

remittance sheets previously identified, according to my recollection—the remittance sheets marked on the taking of the deposition of Mr. Messenger in this case as Defendant's Exhibits 38-A to 38-FF for identification, which I am now showing to you, are in your handwriting; is that correct?

A. All with the exception of this one, again. (Indicating.)

Q. The exception to which you refer is Defendant's Exhibit 38-G for identification, on the Messenger Deposition; is that correct?

A. That is right.

Mr. Erskine: I see no reason, Mr. Lasky, why it is necessary to mark these documents again; do you?

Mr. Lasky: I do not see any necessity for it. They have been properly identified.

Mr. Erskine: They have been identified, yes.

Q. Now, what was your employment, Mr. Gassman, during the year 1948 up to about November 18th, 1948?

A. I was a bookkeeper for the United Produce Company.

Q. What were your duties as bookkeeper?

A. The general routine duties of a [4] bookkeeper.

Q. To keep the books and records of account of the company; is that correct? A. Yes, sir.

Q. Now, did the company have any other bookkeeper who kept its books and records, besides yourself? A. Nobody.

Q. I will show you a book here, Mr. Gassman,

(Deposition of Sam Gassman.)

that is labelled "No. 7—United Produce Company—Cash Receipts from July 1, 1948, to November 20, 1948," and I will ask you to examine that book, and let me know whether or not the entries made in that book are entries made in your handwriting.

Would you do that, please?

(The witness examined the book, turning the pages thereof.)

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

A. Looking at it roughly, I would say that they were in my handwriting, yes, sir.

Mr. Erskine: Now, I want to show you another book—or rather, first, the book that has just been referred to, Mr. Reporter, will you please mark as Defendant's [5] Exhibit No. 1, for identification.

(The book referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 1, (1-A to 1-AAA inclusive) for identification.)

Q. (By Mr. Erskine): Referring you then, to this book, the first page of which has been marked by the Reporter as Defendant's Exhibit 1-A for identification: Your testimony as I understand it is that these entries made in this book are in your handwriting?

A. Generally speaking, I would say so, yes, sir.

Q. Did you notice any, when you were examining the sheets, which are not in your handwriting?

(Deposition of Sam Gassman.)

A. I did not notice any.

Q. And you examined all of the sheets?

A. I believe so, yes, sir.

Q. Now I will show you another book here—or, first, this book that has been marked as Defendant's Exhibit 1, was a record of the United Produce Company, was it? A. Yes, sir.

Q. Kept by you? A. Yes, sir.

Mr. Erskine: Now I will show you another book, and I will ask the Reporter to mark this book as Defendant's [6] Exhibit 2 for identification, the first page being marked 2-A, and so forth.

(The book referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 2, (2-A to 2-YYYYY inclusive) for identification.)

Q. (By Mr. Erskine): I will show you this book, which has just been marked as Defendant's Exhibit 2 for identification upon the taking of your deposition, and I will ask you what book that is.

A. It looks like the record of the Accounts Receivable.

Q. Of the United Produce Company?

A. Of the United Produce Company, yes, sir.

Q. Now, Mr. Gassman, I would like to have you run through that book, and tell me whether or not the entries made therein are in your handwriting.

(The witness examined the book, turning the sheets thereof.)

Mr. Erskine: Let the record show that the witness is now examining the sheets in the book which

(Deposition of Sam Gassman.)

is shown him, in the same manner in which he examined the sheets in the other book, Defendant's Exhibit 1 for identification.

A. Generally speaking, it is all in my handwriting, yes.

Q. When you use the term "generally speaking," you use [7] that term in the same sense that you did with respect to the other one, I take it?

A. Yes, sir.

Q. Now, Mr. Gassman, I will ask you whether or not you made the entries that are recorded in both of the books shown to you, Defendant's Exhibits 1 and 2 for identification, in the course of your duties as bookkeeper of the United Produce Company? A. Yes, sir, I did.

Q. And those entries were made on or about the dates which they bear, were they? A. Yes.

Q. Now, Mr. Gassman, I would like to call your attention to the remittance sheet which was marked upon the taking of the Messenger Deposition as Defendant's Exhibit 38-A for identification, and I would like to have you compare that—or rather, before I come to that: The remittance sheet, as I understand it, shows the payments made on account of Accounts Receivable on that date, July 1, to the Merchandise National Bank on account of a collateral loan; is that correct?

A. It would be on both collateral loan and on draft.

Q. Yes, as you testified the other day.

A. Yes. [8]

(Deposition of Sam Gassman.)

Q. The payments made on account of the collateral loan are the payments which are listed here, is that right—that is, La Mantia Brothers, \$506.16; Frank C. Lofendo, \$15,749; Sanzone-Palmisano Company, \$243.70; Gene Tufo & Company, \$2,008.44, and another payment for Gene Tufo & Company of \$1,239.76?

That is right, is it not? A. Yes.

Mr. Sokol: I wonder if I might be permitted to be off the record for a moment.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

Mr. Erskine: What was the last question and answer, please, Mr. Reporter.

(The record was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): Now, Mr. Gassman, I would like to ask you to compare those items that I have just read off, as payments on account of Accounts Receivable, on items shown in this Cash Receipt Book as of July 1, 1948, as payments received by the United Produce Company on account of Accounts Receivable as of July 1, 1948—or rather, before I [9] come to that, I will ask you this:

Will you designate the payments, or rather, the entries made as of July 1, 1948, in the Cash Receipts Book, in order to record the payments received as of that date, on account of Accounts Receivable by the United Produce Company?

(Deposition of Sam Gassman.)

Would you mind reading those off for the record?

Mr. Sokol: If he can.

Mr. Lasky: What is the reason for his reading them off? That is something anybody can do. They are there.

Mr. Erskine: I just asked him to read those entries. However, in order to try to abbreviate it, then, I will ask you this leading question:

Q. Is it not a fact, Mr. Gassman, that the entries beginning with the name—what is that name?

A. S. Albertson.

Q. (Continuing): —S. Albertson & Sons, \$5,-475, down to and including the name Mazzie Farms, \$25,000, on the first page of the Cash Receipts Book, are the payments—or rather, are the entries made as of July 1 to record payments made on Accounts Receivable as of that date.

A. I would have to say, with the exception of Mazzie Farms.

Q. Oh, yes. [10]

A. With the exception of Mazzie Farms, and Merchandise National Bank.

Q. With those two exceptions—— A. Yes.

Q. —the payments were payments made—or were entries made to record receipts on account of Accounts Receivable as of July 1, 1948?

A. That is right.

Q. Now, Mr. Gassman, those payments are few in number, and I would like to read them off to you:

S. Albertson & Sons; Barnett-Gurstein & Company; La Mantia Brothers; next, a ditto mark un-

(Deposition of Sam Gassman.)

der La Mantia; Sanzone-Palmisano Co.; Gene Tufo & Company; and next, a ditto mark under Gene Tufo?

Is that correct? A. Yes, sir.

Q. Now I would like to have you compare Defendant's Exhibit No. 38-A for identification, the remittance sheet bearing that Exhibit number, with the payments—or the entries that are shown in the Cash Receipts Book which I just read off to you, and tell me which of those entries appear in the Cash Receipts Book, but do not appear in the remittance sheet, Defendant's Exhibit No. 38-A for identification. [11]

Mr. Lasky: That of course is merely a matter of visual examination. The documents speak for themselves.

Mr. Erskine: It will only take a couple of seconds.

Mr. Lasky: Even then, it looks as though there will be no time left for appropriate cross-examination.

A. S. Albertson does not appear; Barnett-Gerstein does not appear; one, for La Mantia, for \$4,799, does not appear.

That is all.

Q. (By Mr. Erskine): For convenience, I will refer to those items that you have just read off as the omitted items, and you will understand that, will you, Mr. Gassman? A. Yes.

Q. And I will refer to the other items included in the list of Accounts Receivable which were read

(Deposition of Sam Gassman.)

off from the Cash Receipts Book, as the included items; and you will understand that.

A. Yes, sir.

Mr. Sokol: While you are looking at that book, counsel, I want to talk with Mr. Gassman outside for a moment; I want to ask him a question.

(Thereupon Mr. Sokol and the Witness Gassman conferred briefly outside the deposition room; after which the taking [12] of the deposition was resumed, as follows:)

Q. (By Mr. Erskine): Now, Mr. Gassman, I would like to ask you if there is a payment on the remittance sheet, Defendant's Exhibit 38-A for identification, on the taking of the Messenger Deposition, as of July 1, 1948, equal to the aggregate of the three omitted items which you specified?

A. Yes.

Q. What payment on the remittance sheet is such payment equal to the aggregate of the omitted items?

A. \$15,749.

Q. Opposite which the name Frank C. Lofendo appears?

A. That is right.

Q. And at the time you delivered this remittance sheet, Defendant's Exhibit 38-A for identification, to the bank, did you deliver to the bank a check of Frank C. Lofendo for that amount?

A. I can't remember whether that was in there or not, at this time, but I would assume it was.

Q. It was your practice, was it not, Mr. Gassman at that time, to deliver to the bank checks for the

(Deposition of Sam Gassman.)

Accounts Receivable being paid, referred to in the remittance sheet? [13]

A. I don't understand the question, sir.

Q. Was it or was it not your practice at the time you delivered a remittance sheet to the bank, in the form of this Defendant's Exhibit 38-A for identification, to accompany it by a check?

A. Yes, sir.

Q. (Continuing): —a check comparing, so far as the name of the maker and the amount were concerned, with each of the items of Accounts Receivable referred to on the sheet?

A. Yes, sir.

Mr. Lasky: Wait a moment. Do I understand that question and the answer correctly?

In the case of Defendant's Exhibit 38-A for identification, and similar documents, wherever there appears a name and an amount, a check in like amount, purporting to be made by the same person, accompanied the remittance sheet—is that my understanding?

Mr. Erskine: Not for each item appearing on the sheet, but for the Accounts Receivable items appearing on the sheet.

Mr. Lasky: Then I do not understand the question and the answer.

Mr. Erskine: Well, I do, and I will let them stand. [14]

Q. (By Mr. Erskine): Now, contemporaneous with the making of entries relating to Accounts Receivable in the Cash Receipts Book, were such

(Deposition of Sam Gassman.)

entries then posted to the other book, the book which you have described, I believe, as the Accounts Receivable Ledger?

A. Will you restate your question again, please, so that I might understand it?

Mr. Erskine: Would you read the question, please, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

A. Yes, sir, they were.

Q. Now, I will ask you this question, Mr. Gassman: Will a comparison of the Cash Receipts Book, and the other remittance sheets, reference to which has been made upon the taking of this deposition, in your previous deposition, show whether or not similar incidents occurred on later dates following July 1, 1948, during the period from July 1 to and including November 17, 1948, that is, incidents relating to the Cash Receipts Book and remittance sheets, similar to that described by you occurring on July 1st?

Mr. Lasky: Now, I object to that question [15] on the ground that all the documents are here, and a comparison can be made by inspection of the documents; and the witness can neither add to nor subtract from what will there appear.

The best evidence happens to be before us, to wit, the documents themselves.

Mr. Erskine: What is your answer, Mr. Gassman?

A. Probably, yes.

(Deposition of Sam Gassman.)

Q. (By Mr. Erskine): A comparison of the sheets with the books will show that?

A. I would say so.

Mr. Erskine: I will show you one other book here, Mr. Gassman, which I will ask the Reporter to mark as Defendant's Exhibit 3, for identification.

(The book referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 3, (3-A to 3-III) for identification.)

Q. (By Mr. Erskine): I show you this book, which has been marked by the Reporter as Defendant's Exhibit No. 3 for identification, and will ask you to tell me what that book is.

A. Looking at it roughly—the first few pages—it looks like the Cash Disbursements Book. [16]

Q. Of the United Produce Company?

A. Yes, sir.

Q. Would you examine that book further, for the purpose of telling me whether or not the entries made in that book are in your handwriting?

The Witness: Can I talk off the record? I was just going to say, I have to be back in my office at one o'clock.

Mr. Erskine: Well, I am very sorry, but it will only take a minute.

Mr. Sokol: I imagine that he would testify that he kept the book.

The Witness: Yes.

Mr. Sokol: Did you keep the book?

The Witness: Yes.

(Deposition of Sam Gassman.)

Mr. Sokol: If you kept the book, that should suffice. He does not have time to check each individual item.

The Witness: No.

Q. (By Mr. Erskine): You kept that book in the course of your duties as bookkeeper of the United Produce Company—Defendant's Exhibit No. 3 for identification? A. Yes, sir, I did.

Q. And the entries made in that book were made on or [17] about the dates they bear; is that correct?

A. Yes, sir.

Mr. Erskine: With that, I am through.

Mr. Sokol: I want to make certain that something appears here—and this should be part of the record.

Mr. Erskine: Yes.

Mr. Sokol: As you have previously testified, on a prior deposition, and on this deposition, you were a bookkeeper for the United Produce Company, although you were a bookkeeper, you had no care, custody or control of the United Produce people's ledgers, is that correct?

The Witness: Yes, sir.

Mr. Lasky: Let this record show that the witness has said he has got to be back in his office at one o'clock, and it is now five minutes to one. Now that means of course that there is no time left for proper cross-examination. I must have opportunity for proper cross-examination, or else this deposition will have to be quashed.

Mr. Sokol: Can you do this by affidavit? Can

(Deposition of Sam Gassman.)

Q. (By Mr. Erskine): A comparison of the sheets with the books will show that?

A. I would say so.

Mr. Erskine: I will show you one other book here, Mr. Gassman, which I will ask the Reporter to mark as Defendant's Exhibit 3, for identification.

(The book referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 3, (3-A to 3-III) for identification.)

Q. (By Mr. Erskine): I show you this book, which has been marked by the Reporter as Defendant's Exhibit No. 3 for identification, and will ask you to tell me what that book is.

A. Looking at it roughly—the first few pages—it looks like the Cash Disbursements Book. [16]

Q. Of the United Produce Company?

A. Yes, sir.

Q. Would you examine that book further, for the purpose of telling me whether or not the entries made in that book are in your handwriting?

The Witness: Can I talk off the record? I was just going to say, I have to be back in my office at one o'clock.

Mr. Erskine: Well, I am very sorry, but it will only take a minute.

Mr. Sokol: I imagine that he would testify that he kept the book.

The Witness: Yes.

Mr. Sokol: Did you keep the book?

The Witness: Yes.

(Deposition of Sam Gassman.)

Mr. Sokol: If you kept the book, that should suffice. He does not have time to check each individual item.

The Witness: No.

Q. (By Mr. Erskine): You kept that book in the course of your duties as bookkeeper of the United Produce Company—Defendant's Exhibit No. 3 for identification? A. Yes, sir, I did.

Q. And the entries made in that book were made on or [17] about the dates they bear; is that correct?

A. Yes, sir.

Mr. Erskine: With that, I am through.

Mr. Sokol: I want to make certain that something appears here—and this should be part of the record.

Mr. Erskine: Yes.

Mr. Sokol: As you have previously testified, on a prior deposition, and on this deposition, you were a bookkeeper for the United Produce Company, although you were a bookkeeper, you had no care, custody or control of the United Produce people's ledgers, is that correct?

The Witness: Yes, sir.

Mr. Lasky: Let this record show that the witness has said he has got to be back in his office at one o'clock, and it is now five minutes to one. Now that means of course that there is no time left for proper cross-examination. I must have opportunity for proper cross-examination, or else this deposition will have to be quashed.

Mr. Sokol: Can you do this by affidavit? Can

(Deposition of Sam Gassman.)

you get together and stipulate certain facts, and have him sign and swear to it?

Mr. Lasky: I think so.

Mr. Erskine: I will stay here as long as necessary, to complete this deposition. I will make any necessary [18] arrangements, under which the deposition can be finished.

Mr. Moses: Can we come back tomorrow, for cross-examination at that time?

Mr. Sokol: I cannot do it tomorrow.

The Witness: Today is my birthday, and I would like to go home to my family, if I can.

Mr. Sokol: I cannot make it tonight, either. I have no interest in either side of this litigation, and no disposition to be rude to anybody——

The Witness: Pardon me, Mr. Sokol.

Mr. Sokol: Yes?

The Witness: If you can complete it in fifteen minutes—do you think you can?

Mr. Lasky: I will try.

Mr. Sokol: Why not go ahead and finish with him, and get it over with?

Mr. Lasky: I will try, because I have no disposition to hold things up.

Cross-Examination

By Mr. Lasky:

Q. I show you again, Mr. Gassman, the document marked as Defendant's Exhibit No. 38-A for identification on the Messenger Deposition, and similar

(Deposition of Sam Gassman.)

documents which you have seen and identified before as being in your [19] handwriting.

Now, you will notice that on each of these sheets appears in your handwriting a list of names; is that correct? A. Yes, sir.

Q. And opposite the names appear certain sums?

A. Yes.

Q. Representing money? A. Yes, sir.

Q. Now, when one of those sheets, such as Defendant's Exhibit 38-A for identification was delivered by you to the Merchandise National Bank, such sheet was accompanied by a check, or checks; is that correct? A. Yes, sir.

Q. Was there not, for each name listed on one of these sheets, a check purporting to be signed by the party whose name there appears?

A. Yes, sir, with the exception of these items up here (indicating) which were the payment of drafts.

Q. To clarify that, the items you refer to are those where the total is carried over——

A. Into drafts.

Q. (Continuing): ——into the second column, called Drafts Discounted? [20] A. Yes.

Q. But with respect to items where the total is carried over in this other column——

A. Returned payable.

Q. Yes.

A. There were checks, as you stated before, yes, sir.

Q. In other words, opposite each name listed

(Deposition of Sam Gassman.)

there was a check of that party? A. Yes.

Q. In the amount stated opposite?

A. Yes, sir.

Q. And that was true in the case of each one of these sheets?

A. As I recall it, yes, sir.

Q. All right. Now, you have referred here to the Cash Receipts Book, which has been marked as Defendant's Exhibit 1-A for identification, the whole book——

Mr. Erskine: No; each page will have a letter designation, as part of Defendant's Exhibit 1.

Mr. Sokol: As I understand it, you are marking the books as Defendant's Exhibits 1, 2 and 3 for identification, and the pages will bear the designation 1-A, 2-A, 3-A, and so on.

Mr. Lasky: The page to which you referred, Mr. Erskine, [21] in your questioning, would be page 1-B?

Mr. Erskine: No, that would be 1-A, according to what has just been stated. If we mark the book Exhibit 1, with the letter designations on each page, then the page to which I was referring would be 1-A.

Mr. Lasky: All right, just as long as we understand that, we can proceed on that basis.

Q. (By Mr. Lasky): Referring to page 1-A of Defendant's Exhibit 1 for identification, certain names and amounts which here appear, also appear in the same way, that is, the same names and the

(Deposition of Sam Gassman.)

same amounts, upon one of the daily remittance sheets.

Now, you referred to Defendant's Exhibit 38-A for identification——

A. Well, not the same names that appear here (indicating) appear here (indicating), no, sir.

Q. But certain of them do?

A. Certain of them do, yes.

Q. You have pointed out that some of the names that appear on the daily remittance sheet, do not appear on Defendant's Exhibit 1-A?

A. Some of them that appear here (indicating)——

Q. Yes, do not appear on the Defendant's Exhibit 1-A? A. Yes. [22]

Q. But you have testified that, totalling certain items which appear under certain names on Defendant's Exhibit 1-A for identification, the same total appears on Defendant's Exhibit 38-A for identification, under a different name?

A. That is right.

Q. Well, now, let me ask you this question: With respect to those items which appear on Defendant's Exhibit 38-A for identification, but not on Defendant's Exhibit No. 1-A on your deposition, were there any—or, rather, I had better reframe that question.

Take those names and amounts which appear upon Defendant's Exhibit 1-A for identification, on your deposition, which do not appear on Defend-

(Deposition of Sam Gassman.)

ant's Exhibit 38-A for identification on Mr. Messenger's Deposition——

Mr. Sokol: Pardon me. Off the record.

(At this point there occurred an informal discussion, outside the record, which was not taken down by the Reporter.)

Q. (By Mr. Lasky): I will ask you this question, Mr. Gassman: With respect to those entries you just referred to, where in fact no such amounts were received from the persons named, upon whose instructions were entries of that [23] character and type made? A. Mr. Rosenthal's.

Q. The secretary-treasurer of United Produce Company? A. That is right.

Q. Now, referring to the daily remittance sheets of which Defendant's Exhibit 38-A of Mr. Messenger's Deposition is the form: Referring to items under the name Frank C. Lofendo, where in the books of the United Produce Company were those receipts from Frank C. Lofendo, or from the name of Frank C. Lofendo, recorded, under what account?

A. Those from Frank C. Lofendo?

Q. Yes. A. Under any account.

Q. Under any account?

A. It could have been under any of the accounts, in the Accounts Receivable.

Q. Was there anything whatever in the books of the United Produce Company which would record the receipt from Frank C. Lofendo of such sums?

(Deposition of Sam Gassman.)

A. Pardon me, but I don't understand your question, Mr. Lasky.

Mr. Lasky: Well, I will try to clarify it.

Q. Take for example Defendant's Exhibit No. 38-A for [24] identification, where there is an item listed for Frank C. Lofendo of \$15,749.

A. All right.

Q. That item does not appear in the Cash Receipts on the page marked on your Deposition as Defendant's Exhibit 1-A for identification, does it?

A. No.

Q. But is there anywhere in the books of United Produce Company, where there is a record of a receipt by the United Produce Company from Frank C. Lofendo of a check for \$15,749?

A. No, there is not—that is, not in the actual books, no, sir.

Of course, the question there is, what you refer to as "books."

Can I go off the record a minute?

Mr. Lasky: Yes.

(There followed an informal discussion, outside the record, which was not taken down by the Reporter.)

Q. (By Mr. Lasky): Is there any account, or was there any account kept in any of the books of the United Produce Company under the name of Pre-Season Advances, or any similar name? [25]

A. Yes, sir, there were.

(Deposition of Sam Gassman.)

Q. Is that in any of the books that you have here before you on this deposition?

A. No, none of these.

Q. What book would it be in?

A. Wait a minute. Let me see. It might be in this one—no, I don't think it is in this one, either. There was another book, either of this size or a smaller size, that showed Pre-Season Advances.

Q. I see. Now, let me ask you this question, as to whether or not checks received by the United Produce Company over the signature of Frank C. Lofendo, were somehow, and in some way, recorded in that account or a related account—I mean, the Pre-Season Advances account?

Mr. Erskine: That is, checks referred to in the remittance sheets?

Mr. Lasky: Yes.

A. Those referred to in the remittance sheets?

Q. (By Mr. Lasky): Yes.

A. I don't remember, Mr. Lasky; I really don't remember.

Q. What other books, if any, did United Produce Company keep besides those which have been marked for identification [26] here?

A. General Ledger, a Pre-Season Journal, and then there were the Accounts Payable bookkeeping cards.

Q. Do you know where those books are now?

A. I don't have the slightest idea.

Q. Now, what kind of shipping documents were used by the United Produce Company in the shipping and handling of produce handled by it?

(Deposition of Sam Gassman.)

A. Well, that was outside the scope of my duties; I mean, that was in the scope of the Traffic Man's duties.

Q. You were not acquainted with whether or not they used—or rather, with what kind of bills of lading they used?

A. I am not familiar with that to any extent, really, no, sir.

Mr. Lasky: Well, all right. I think, then, I will discontinue my examination at this time.

Mr. Erskine: Just a moment, please.

Mr. Sokol: Is that all, gentlemen?

Mr. Erskine: Just one moment further, please. Yes, that is all.

And Further the witness deposed and said not.

Mr. Sokol: All right, Sam; you may go.

(Witness excused.) [27]

/s/ SAM GASSMAN.

Subscribed and again sworn to before me this 29th day of December A.D. 1949.

[Seal] /s/ CLAUDE W. YOUKER, SR.,
Notary Public, State of
Illinois.

My Commission expires September 20, A.D. 1950.

[Received in evidence as Defendant's Exhibit W.]

[Endorsed]: Filed May 24, 1950. [28]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies thereof, in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants:

Complaint.

Order requiring persons to be joined as party defendants.

Answer and Counterclaim and Interpleader by Counterclaim.

Answer of Frank C. Lofendo to Defendant's Counterclaim.

Plaintiff's reply to Defendant's Counterclaims.

Answer of Eugene J. O'Riley, as Trustee, to Plaintiff's Complaint and Reply to Defendant's Interpleader Counterclaim.

Answer of Cy Mouradick to Plaintiff's Complaint and to Defendant's Interpleader Counterclaim.

Amended Answer and Counterclaim.

Amended Complaint.

Affidavit of Morse Erskine in opposition to motion allowing the filing of amended complaint, filed June 29, 1950.

Stipulation concerning testimony of Dean Howell.

Affidavit of John R. McDonough, filed July 19, 1950.

Affidavit of Moses Lasky, filed July 19, 1950.

Affidavit of Morse Erskine, filed September 7, 1950.

Affidavit of L. J. Tobey, filed September 7, 1950.

Affidavit in support of offer of proof, filed September 7, 1950.

Stipulation of facts.

Order for judgment in favor of plaintiff.

Order denying motion to strike the amended complaint.

Findings of fact and conclusions of law.

Judgment.

Defendant's proposed findings of fact and conclusions of law.

Stipulation that execution of judgment shall be stayed.

Cost bill.

Defendant's objections to items of costs.

Notice of motion by Plaintiff to review taxation of costs.

Notice of motion by Defendant to review taxation of costs.

Order overruling objections to taxation of costs.

Defendant's notice of appeal.

Interpleaded Defendant's, Eugene J. O'Riley, notice of appeal.

Defendant's designation of record on appeal.

Stipulation on appeal.

Plaintiff's Exhibits: 1, 2, 3-A for Ident., 3-B for Ident., 4 for Ident., 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34.

Defendant's Exhibits: B, C, C-1, D, E, F, G, H, I for Ident., J, K for Ident., L, M for Ident., N for Ident., O, P for Ident., Q, R, S for Ident., T for Ident., U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, YY.

Reporter's Transcript, June 15, 1950.

Reporter's Transcript, June 16, 1950.

Reporter's Transcript, June 19, 1950.

Reporter's Transcript, June 20, 1950.

Reporter's Transcript, June 21, 1950.

Reporter's Transcript, June 22, 1950.

Reporter's Transcript, June 23, 1950.

Reporter's Transcript, June 26, 1950.

Reporter's Transcript, June 29, 1950, (two volumes).

Deposition of Arthur V. Royds.

Deposition of Louis D. Rosenthal.

Deposition of Anthony L. Koefoot.

Deposition of William Edward Tague.

Deposition of Henry J. Reichwein.

Deposition of Frederick C. Messenger (Vol. 1).

Deposition of Frederick C. Messenger (Vol. 2).

Deposition of William F. Collins.

Deposition of Raymond L. Redheffer.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 31st day of July, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13039. United States Court of Appeals for the Ninth Circuit. Bank of America National Trust and Savings Association, a National Banking Association, and Eugene J. O'Riley, as Trustee in Bankruptcy of the Estate of United Produce Company, a Corporation, Bankrupt, Appellants, vs. Merchandise National Bank of Chicago, a National Banking Association, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed July 31, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13039

MERCHANDISE NATIONAL BANK OF CHICAGO, a National Banking Association,

Plaintiff and Respondent,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association,

Defendant and Appellant.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

The points upon which appellant, hereinafter referred to as defendant, intends to rely upon this appeal are these:

I. Points With Respect to the Payment of the Checks.

1. The evidence shows without conflict that appellee, hereinafter referred to as plaintiff, paid the four checks aggregating \$89,831.00 and the six checks aggregating \$113,216.50; and the findings of the trial court that the four checks and the six checks were not paid or collected is clearly erroneous.

In this connection defendant relies on the following subordinate propositions:

(a) If it be assumed that when plaintiff debited the four checks and the six checks against the commercial account of United Produce Company, hereinafter referred to as United, with plaintiff, there was not a good balance to the credit of United in the account, but an overdraft, nevertheless the acts of plaintiff with respect to the four checks and six checks (including the debiting of them against United's account, the perforating them with a mark to the effect that they were paid, the crediting of defendant on the books of plaintiff with their amounts, and the sending to defendant of the so-called advices of credit to the effect that they were paid) constituted payment of the checks.

(b) The findings of the trial court that when on November 12, 1948,¹ the plaintiff debited the four checks against the account of United with it and when on November 15th, it debited the six checks against this account there was an apparent credit balance therein, but in fact there was no such balance, but an overdraft of over \$500,000.00, is not supported by the evidence and is clearly erroneous. The evidence shows without conflict (i) that when the four checks and the six checks were debited against the account, there was a good balance therein to the credit of United and (ii) that when plaintiff made these debits it was not laboring under

¹As all the events in this case took place in 1948, we hereafter in stating dates in this instrument will only refer to the month and day and not the year; it will be understood that the year of each date will always be 1948.

a mistake that there was a good balance in the account when in fact there was an overdraft in it.

(c) The evidence shows without conflict that United delivered to plaintiff checks, hereinafter referred to as Lofendo checks, signed by Frank C. Lofendo, hereinafter referred to as Lofendo, and payable to United as remittances on account of accounts receivable assigned by United to plaintiff to secure loans made by plaintiff to United. The trial court's findings, that under the agreement between plaintiff and United the Lofendo checks delivered by United to plaintiff as remittances on account of assigned accounts receivable constituted conditional credits in the amounts of such checks subject to charge-back at any time before actual collection of the funds, is clearly erroneous. The evidence shows without conflict that plaintiff accepted all checks delivered to it by United as remittances on account of assigned accounts receivable as payments on account of loans made by it to United; and that when such checks were not paid upon presentation the effect was to restore the indebtedness of United to plaintiff to the amount at which it would have been if the checks had not been accepted as payments. When such checks were not paid, plaintiff under the general law had a right to offset its indebtedness to United evidenced by United's credit balance in its commercial account with plaintiff against United's indebtedness to it; but this right of plaintiff did not arise under any agreement between United and plaintiff evidenced by writings. And the fact that plaintiff had this right did not

reduce the balance to the credit of United with plaintiff until plaintiff actually exercised its right of set-off. The evidence shows without conflict that plaintiff did not exercise this right until after both the four checks and the six checks had been paid.

(d) The findings of the trial court, that United presented the four and six checks to the East Bakersfield Branch of defendant, which branch will be referred to hereafter as the branch, is not a correct statement of the fact. It is true that in the month of November and for about two months prior to November, United was using the account established by Lofendo at the branch, which account will be referred to herein as the Lofendo account, for its own purposes and that Lofendo did not have any interest in the checks drawn on this account or in the checks credited thereto; but it is also true that Lofendo established the account and that all checks deposited therein were deposited in his name and purported to be deposits of his and that the branch believed that he was presenting the checks to it for deposit to the account.

II. Points With Respect to Question Whether Defendant Was a Purchaser for Value of the Four Checks and Their Proceeds.

The trial court found that on November 17th, there was a telephone conversation between plaintiff and defendant in which plaintiff gave defendant notice that United had defrauded plaintiff; that at the time defendant received this notice it had not acted in any way on the advices of credit with

respect to the four checks; that defendant did not at any time either before or after this telephone conversation change its position in any way to its detriment in reliance upon these advices of credit; that defendant did not act on the advices of credit until November 18th, when defendant posted the credit to the Lofendo account; and that defendant never became a bona fide purchaser for value of the four checks or their proceeds. These findings will be referred to hereafter as the findings of the trial court that defendant did not become a purchaser for value of the four checks.

And as a conclusion of law the trial court found that after November 17th, defendant had no authority or right to pay to Lofendo or itself in discharge of any obligation of Lofendo to it the sum represented by the four checks.

1. Under the law plaintiff cannot recover its payment of the four checks and the six checks even if it be assumed for argument's sake that defendant did not act on the advices of credit with respect to the four checks or with respect to the six checks and that its position was not changed in any way to its detriment because plaintiff had paid these checks and had sent defendant the advices of credit. The law is that when one bank pays checks to another bank in the course of the banking business, the paying bank cannot recover such payment on the ground that it was induced by its own mistake or by the fraud of some third person to make the same. This is the law because any other rule would

create intolerable delay, uncertainty and confusion in the vast commercial transactions carried on by means of checks.

2. The branch sent the four checks to plaintiff for collection with a collection letter directing plaintiff to credit the proceeds to defendant with advice to the branch. When on November 12th, plaintiff paid the four checks and when it, pursuant to the directions of the collection letter, credited defendant on its books with the amount of the four checks and sent the branch advices of credit to the effect that the checks had been paid, the agency of defendant for Lofendo to collect the four checks terminated and plaintiff on November 12th, became indebted to defendant for the amount of the four checks and defendant at the same time became indebted to Lofendo in such amount. When on November 12th, defendant thus became a creditor of plaintiff and a debtor of Lofendo in the amount of the four checks, its position was changed and on that date it became a bona fide purchaser of the four checks and their proceeds and so plaintiff cannot recover from defendant its payment of them.

3. If it be assumed for argument's sake that on November 12th, defendant did not cease to be the agent of Lofendo for the collection of the four checks and that on that date defendant did not become a creditor of plaintiff and a debtor of Lofendo in the amount of the four checks, nevertheless at the very latest when on November 16th the advices of credit for the four checks were received

at the branch, defendant's agency for their collection was terminated and defendant on that day became the creditor of plaintiff and the debtor of Lofendo in such amount; and so at the very latest, on November 16th, before plaintiff had given defendant any notice that United had defrauded it, defendant's position was changed with respect to the four checks and on that date defendant became a bona fide purchaser of them and their proceeds, and so plaintiff cannot recover their payment from defendant.

4. The trial court's conclusion of law that defendant did not become a debtor of Lofendo in the amount of the four checks is not supported by any evidence and is contrary to the law and is clearly erroneous.

5. As stated, when on November 16th the advances of credit for the four checks were received at the branch, it at the very latest became indebted to Lofendo in the amount of the four checks. The evidence shows without dispute that at the close of business on November 16th, Lofendo was indebted to the branch in the sum of \$172,094.84. As of the close of business on that date these cross demands compensated one another regardless of when the bookkeeping entries evidencing the offset were made. And therefore at the close of business on November 16th, before defendant had been advised by the telephone conversation of November 17th that United had defrauded plaintiff, defendant had become a bona fide purchaser for value of the four

checks and their proceeds and consequently plaintiff cannot recover their payment from defendant.

6. The evidence shows without dispute that the amount of the four checks was credited to the Lofendo account on November 17th, and that, pursuant to the banking practice of delayed posting, this credit was posted on November 18th as of November 17th. If it be assumed for argument's sake that said cross demands did not compensate one another until defendant took some action to credit Lofendo with the amount of the four checks, nevertheless defendant on November 17th before the telephone conversation on that date did give Lofendo credit for the four checks and therefore at the very latest it changed its position on that date and became a bona fide purchaser of the four checks and their proceeds.

7. As stated, at the close of business on November 16th, Lofendo was indebted to the branch in the sum of \$172,094.84 and as also stated at the close of business on that date, the branch had in its hands the advices of credit for the four checks. Under the law defendant had a lien upon the four checks and upon their proceeds and upon the advices of credit for the four checks to secure Lofendo's indebtedness to it, and therefore defendant was in the position of a holder for value of the four checks and the advices of credit with respect to them and their proceeds and so plaintiff cannot recover its payment of the four checks from defendant.

8. The evidence shows without conflict the facts stated in the following subparagraphs (a) to and including (d) of this paragraph 8:

(a) On November 16th the branch received in the mail for deposit to the Lofendo account checks drawn by United payable to Lofendo aggregating \$97,207.00; and on that day it gave Lofendo credit for the amount of these checks (which credit was conditional, that is it was subject to the condition that the checks would be paid on presentation) and sent them to its correspondent in Chicago so that its correspondent could present them through the clearing house to plaintiff for payment. On November 15th checks aggregating \$75,586.86 drawn by Lofendo payable to United arrived at the branch and on November 16th checks aggregating \$109,569.15 drawn by Lofendo and payable to United arrived at the branch. At the close of business on November 16th there was to the credit of Lofendo in his account with the branch \$13,061.17 of collected funds plus the credit of \$97,207.00. At the close of business on November 16th the branch charged the checks for \$109,569.15 against the amount to the credit of Lofendo in the account. The advice of credit for the four checks for \$89,813.10 arrived at the branch on November 16th after this charge of \$109,569.15 had been made against the account. As already stated, the four checks were credited to the account on November 17th, but pursuant to the practice of delayed posting, this credit was posted to the account on November 18th as of November 17th. Concurrently

with the entry on the books of the credit for the four checks of \$89,813.10, the checks for \$75,586.86 were charged against it. On November 18th, after the close of business, the branch received word from its Chicago correspondent that plaintiff had refused payment of the checks for \$97,207.00.

(b) Although the collection letter which accompanied the six checks when they were forwarded by the branch to the plaintiff for payment had requested that this advice be sent to the branch, plaintiff sent it to the head office of the defendant in San Francisco where it was received on November 18th. As the head office of defendant had no function to perform with respect to this advice of credit other than to treat it as a misrouted item, it sent it to the branch where it was received on November 19th. On that date the branch credited the Lofendo account with the amount of the six checks and on the same day charged the account with the checks for \$97,207.00.

(c) The checks for \$109,569.15 were payable to United and were Lofendo checks delivered to plaintiff by United as remittances and were applied by plaintiff on account of United's indebtedness to it; and therefore when the branch paid these checks United's indebtedness to plaintiff was reduced by the amount of them and so plaintiff got the benefit of such payment.

(d) The checks for \$75,586.86 included checks for \$51,862.36 which were payable to United and were Lofendo checks delivered to plaintiff by United as remittances and were applied by plaintiff on

account of United's indebtedness to plaintiff; and therefore when the branch paid these checks United's indebtedness to plaintiff was reduced by the payment of them and so plaintiff got the benefit of such payment.

As stated, the checks for \$75,586.86 were charged by the branch against a credit balance made up principally of the credit created by plaintiff's payment of the four checks. And so if plaintiff is permitted to recover its payment of the four checks it will, in effect, be paid twice; it will have received the benefit of the payment of the \$51,862.63 charged against a credit balance made up principally of the amount of the four checks and at the same time it will have recovered this latter amount. Under the law this inequitable result precludes plaintiff in any event from recovering from defendant the payment of the four checks.

9. Said finding of the trial court that defendant did not become a purchaser for value of the four checks, and said conclusion of law that after November 17th defendant had no authority or right to pay itself in discharge of any obligation of Lofendo to it in the sum represented by the four checks, are not supported by any evidence and are clearly erroneous.

III. Points With Respect to Question Whether Defendant Was a Purchaser for Value of the Six Checks and Their Proceeds.

The trial court found that at no time did defendant in any way take any action whatsoever in re-

liance on the advice of credit relative to the six checks or in reliance on the supposed collection or payment of the six checks, and that defendant in no way at any time changed its position or suffered any prejudice in reliance on the supposition that the six checks or any of them had been paid, and that at no time did defendant give anything of value to anyone for the six checks. This finding will be referred to hereafter as the finding of the trial court that defendant did not become a purchaser for value of the six checks.

1. As indicated, defendant makes the same point with respect to the six checks as that made with respect to the four checks in paragraph 1 of section II of this paper.

2. The branch sent the six checks to plaintiff for collection with a collection letter requesting plaintiff to credit the proceeds to defendant with advice to the branch. When on November 15th plaintiff paid the six checks and when it, pursuant to the direction of the collection letter, credited defendant on its books with the amount of the six checks and sent defendant an advice of credit to the effect that the checks had been paid, the agency of defendant for Lofendo to collect the six checks terminated and plaintiff on November 15th became indebted to defendant in the amount of the six checks, and defendant at the same time became indebted to Lofendo in the same amount. When on November 15th defendant thus became a creditor of plaintiff and a debtor of Lofendo in the amount

of the six checks, its position was changed and on that date it became a bona fide purchaser of the six checks and their proceeds, and so plaintiff cannot recover from defendant its payment of them.

3. If it be assumed for argument's sake that on November 15th defendant did not cease to be the agent of Lofendo for the collection of the six checks, and that on that date defendant did not become a creditor of plaintiff and a debtor of Lofendo in the amount of the six checks, nevertheless at the very latest when the advice of credit for the six checks was received by defendant, defendant's agency for the collection of the checks was then terminated and defendant on that date became the creditor of plaintiff and the debtor of Lofendo and therefore its position was changed. The fact that such change in position occurred after the telephone conversation of November 17th in which plaintiff told defendant that United had defrauded it can make no difference; such change of position on defendant's part was inevitable when on November 15th plaintiff paid the six checks and mailed defendant the advice of credit with respect to them; after that date defendant could do nothing to prevent such change in its position from taking place; and so in any event defendant became a purchaser for value of the six checks and plaintiff cannot recover from defendant its payment of them.

4. As stated, the evidence shows without dispute that at the close of business on November 16th, Lofendo was indebted to the branch in the sum of

\$172,094.84; that the branch credited the account with the amount of the four checks on November 17th and posted this credit on November 18th as of November 17th; and that concurrently the branch charged the account with the checks for \$75,586.86. The evidence also shows without conflict that when this was done, the indebtedness to Lofendo as of the close of business on November 17th was reduced to \$82,281.74; that this indebtedness arose out of the fact that on November 15th the branch had given Lofendo the conditional credit for the checks for \$97,207.00, which credit the branch had the right to recover from Lofendo at any time prior to the payment of these checks; that on November 18th the branch was notified by its Chicago correspondent that plaintiff had refused payment of the checks for \$97,207.00; and that therefore at the close of business on November 18th, Lofendo's indebtedness to defendant for \$82,281.74 became unconditional. Under the law, defendant had a lien upon the six checks and upon their proceeds and upon the advice of credit for the six checks to secure Lofendo's indebtedness to it. And therefore defendant was in the position of a holder for value of the six checks and their proceeds and so plaintiff cannot recover its payment of the six checks from defendant.

5. As stated, the evidence shows without conflict that the checks for \$109,569.15 were payable to United and were Lofendo's checks delivered to plaintiff by United as remittances and were applied by plaintiff on account of United's indebtedness to

it; that when the branch paid these checks United's indebtedness to plaintiff was reduced by their amount; and that therefore plaintiff got the benefit of such payment. And as also stated, the evidence shows without conflict that after plaintiff got the benefit of defendant's payment of the checks for \$109,569.15, it refused to pay the checks for \$97,207.00, the crediting of which to Lofendo's account created the credit balance against which the checks for \$109,569.15 were charged; and that upon plaintiff's rejection of the checks for \$97,207.00, these checks were charged against the balance in the account created by the crediting thereto of the six checks for \$113,206.50. If plaintiff is permitted to have the \$109,569.15 charged against the \$97,207.00 and at the same time to recover the \$113,216.50 against which the \$97,207.00 was charged, it will be getting the benefit of the \$97,207.00 paid out by defendant and at the same time will be denying defendant the benefit of its payment of the six checks. Under the law this inequitable result precludes plaintiff in any event from recovering from defendant the payment of the six checks.

6. Said findings of the trial court that defendant did not become a purchaser for value of the six checks are not supported by any evidence and are clearly erroneous.

IV. Points With Respect to the Trial Court's Findings Concerning Plaintiff's Account With Defendant.

The trial court found that through 1948, plaintiff

had a deposit account with defendant with a large credit balance in plaintiff's favor; that during the existence of that account defendant from time to time sent to plaintiff for collection checks drawn upon plaintiff; that in such cases defendant was authorized by plaintiff to charge plaintiff's said account with the amount of the checks, and would so charge the account only upon actual receipt from the plaintiff of a written authorization to do so, in the form of an outstanding and unrevoked credit memorandum or advice of credit; that this was the uniform custom, practice and arrangement between plaintiff and defendant and was observed by defendant at all times until November 19, 1948; that on November 19th defendant charged plaintiff's deposit account with the six checks and that said charge was made without authority from plaintiff and without legal right and was insufficient to reduce defendant's indebtedness to plaintiff in any amount.

The trial court's findings (i) that defendant would only charge plaintiff's account with it upon actual receipt from plaintiff of a written authorization to do so in the form of an outstanding credit memorandum and advice of credit, and (ii) that this was the uniform custom, practice and arrangement between plaintiff and defendant and was observed by defendant at all times until November 19, 1948; and (iii) that the charge by defendant on November 19th of plaintiff's account with it with the amount of the six checks was without authority from plaintiff and without legal right and was

insufficient to reduce defendant's indebtedness to plaintiff in any amount, are all without any evidence to support them and are clearly erroneous. But in any case these findings are irrelevant. The crucial issues in this case are whether plaintiff paid the four checks and the six checks and whether it under the law has the right to recover such payments upon the ground that it was induced to make same by mistake or fraud. If plaintiff made the payments and is not entitled under the law to recover them, it cannot prevail in this action regardless of the charges made by defendant against plaintiff's account.

V. Points With Respect to the Alleged Agreement That Plaintiff's Payment of the Six Checks Should Be Rescinded.

The trial court found that on November 17th plaintiff had a telephone conversation with defendant in which plaintiff informed defendant that the advice of credit for the six checks was rescinded and revoked and in which defendant agreed with plaintiff not to act upon the advice of credit if and when it should be received by defendant and agreed to return it to an emissary of plaintiff; and the trial court also found that on November 18th defendant agreed that it would not act upon the advice of credit for the six checks when received and that it would return this advice to plaintiff and that plaintiff would return the six checks to defendant.

These findings of the trial court are based upon the telephone conversation of November 17th between Frederick C. Messenger, an officer of plain-

tiff, and F. E. Estribou, the manager of the branch; and on conversations between Allen R. LeRoy, another officer of plaintiff, and officers of defendant which took place in San Francisco on November 18th and on a letter delivered by LeRoy to defendant on that date.

1. Plaintiff contends in substance that the effect of the alleged agreement was that when defendant agreed, as alleged, that it would not act upon the advice of credit and would return it, defendant was in effect agreeing to a rescission of the payment of the six checks by plaintiff and that defendant would surrender rights already vested in it by repaying to plaintiff the amount of the six checks. Said evidence upon which said findings with respect to the alleged agreement is based shows that there was no intent to effect by agreement the legal relations between the parties. Said evidence shows that plaintiff was not recognizing any rights on defendant's part and was not asking defendant to enter into an agreement surrendering such rights; but said evidence shows at most that plaintiff simply gave defendant a direction that the advice of credit was being rescinded because sent out in error and that defendant acquiesced in such direction, and that the parties did not intend to make and did not make an agreement altering their legal relations. Therefore the findings that the alleged agreement was made are not supported by any evidence and are clearly erroneous.

2. But if it be assumed for argument's sake that

the alleged agreement was made, then it was invalid and unenforceable for the following reasons:

(a) The alleged agreement was not supported by any consideration.

(b) The alleged agreement was based on a mutual mistake respecting the existence of a basic fact, namely, that there was a good balance to the credit of Lofendo in the branch and that therefore defendant would not take any loss by agreeing to the rescission of the payment.

(c) The alleged agreement was induced by plaintiff's misrepresentations that the advice of credit had been sent out in error, whereas the evidence shows without dispute that plaintiff did not send out the advice of credit in error, but that it, as part of the regular routine of its banking business, sent out the advice of credit, at the same time charging the six checks against a good balance to the credit of United in United's commercial account.

(d) The evidence shows without dispute that plaintiff by its misrepresentations induced defendant to pay checks drawn on the Lofendo account to the order of United and induced defendant to give Lofendo credit for the checks drawn by United payable to Lofendo and deposited in the branch. This conduct on plaintiff's part precludes it from enforcing the alleged agreement.

(e) As hereafter stated more at length, plaintiff by its gross negligence permitted United to engage in a kiting operation which caused the loss involved in this litigation which either plaintiff or defendant must bear; this negligence on plaintiff's

part precludes it from enforcing the alleged agreement.

(f) And finally the evidence shows without dispute that at the very time tthe alleged agreement was made plaintiff was refusing to pay said checks for \$97,207.00; that when plaintiff was discussing the alleged agreement with defendant, plaintiff knew that its rejection of these checks would create a large overdraft in the Lofendo account and that defendant was dealing with it upon the assumption that no such overdraft existed; but that plaintiff did not advise defendant at that time that it was rejecting such checks for \$97,207.00. This inequitable conduct of plaintiff precludes it from enforcing the alleged agreement.

VI. Points in Support of Defendant's Contention That Plaintiff Is Precluded by Its Own Negligence and Misrepresentation From Recovering Payment of the Four and the Six Checks

1. The record shows without dispute that in November, 1948, and for several months prior thereto, United was engaged in what is known in banking circles as a kite; that in order to carry on this kite, United would draw a check upon the branch bearing Lofendo's signature and would deliver such check to plaintiff either to obtain credit in its commercial account or as a remittance on account of Lofendo's accounts receivable assigned by United to plaintiff; that when such checks were delivered as remittances, plaintiff upon receiving such checks would make an additional loan to

United, the proceeds of which would be credited to United's commercial account with plaintiff; and that as a result of this practice of plaintiff in making loans to United, United in effect received credit in its commercial account for the Lofendo checks delivered by it to plaintiff as remittances. The record also shows without dispute that when United would deliver Lofendo checks to plaintiff either as remittances or for credit in its commercial account, it would draw its own checks payable to Lofendo and endorse such checks in Lofendo's name and would cause such checks to be deposited to the account of Lofendo in the Lofendo account with the branch within such time so that when such checks of Lofendo drawn to the order of United were presented to the branch for payment, there would be funds to his credit in the branch to pay them; that one side of the kiting operation was the side in which checks of Lofendo drawn to the order of United were either deposited to the credit of United in its commercial account with plaintiff or delivered by United to plaintiff as remittances; and that the other side of the kiting operation was the side in which checks of United drawn to the order of Lofendo were deposited to the credit of Lofendo in the Lofendo account with the branch; and that in November of 1948, and for several months prior thereto there were many checks used on both sides of the kite. And finally the record shows without dispute that plaintiff was guilty of the grossest negligence in not having dis-

covered and put a stop to the kite long prior to the payment by it of the four and six checks.

The trial court made no findings with respect to defendant's claim that plaintiff was guilty of such negligence in not having discovered the kite. The only findings which the court made with respect to the point were that it was not true that any act of plaintiff in allowing United to incur obligations of any kind to it or anything else ever done or omitted by plaintiff in any way proximately caused or contributed to any loss sustained by defendant in any amount and that it is not true that defendant, or plaintiff, or anyone else has ever suffered any loss by reason of the six checks since defendant paid out no funds and did no act in any way to its detriment in reliance on the six checks.

But plaintiff's negligence in not having discovered and put a stop to the kite did proximately cause the loss which either plaintiff or defendant shall suffer because of the payment of the four checks and the six checks and the trial court's findings to the contrary are not supported by any evidence and are clearly erroneous. As such negligence of plaintiff proximately caused such loss plaintiff is precluded from recovering these payments from defendant.

2. The trial court erred in not finding the facts with respect to plaintiff's negligence in not having discovered and put a stop to the kite. (These facts are stated in paragraphs XIII to and including XXX of the findings of fact proposed by de-

fendant; reference is hereby made to these paragraphs of these proposed findings for a statement of these facts.)

3. Although the trial court made no findings with respect to the allegations of defendant's answer that plaintiff was guilty of negligence in not having discovered and put a stop to the kite, it did find that as early as October 22nd, 1948, defendant became suspicious that the Lofendo account was being operated as part of a check kiting operation; that on that day defendant gave instructions to its employees that thereafter they were not to accept for immediate credit any checks drawn by United to the order of Lofendo but were to accept such checks for collection only and were not to permit Lofendo to draw against any items until such checks were so collected; that defendant did not fully observe these instructions until November 10th; that on November 10th defendant became positive that the transactions going on between Lofendo and United were not ethical but were part of some dishonest scheme; that on that day defendant reiterated imperative instructions that no checks of United drawn to the order of Lofendo and tendered to defendant for deposit were to be accepted for credit and were to be accepted for collection only and that no withdrawals of any items were to be made until said collection.

The findings of the trial court that on October 22nd, 1948, or thereabouts, defendant became suspicious that the Lofendo account was being operated as a check kiting operation are clearly erroneous.

As stated, the checks being deposited in the Lofendo account were checks drawn by United on plaintiff. The record shows without dispute that on or about October 20th the branch made inquiry of plaintiff respecting United's account with plaintiff and its standing and financial position; and that plaintiff in response misrepresented to the branch United's position and financial standing; and that the branch in thereafter handling the Lofendo account relied upon these representations. The record also shows without dispute that on or about October 20th the branch made other inquiries with respect to the account, and that plaintiff's representations plus the result of such other inquiries satisfied it that there was nothing wrong in the account. And the findings that on November 10th defendant became positive that transactions going on between Lofendo and United were not ethical and were part of a dishonest scheme are likewise clearly erroneous. The record shows without dispute that the branch did not begin to suspect that a kiting operation might be going on until around November 13th or 14th when there were no funds in the Lofendo account to pay checks drawn upon it. And the record shows without dispute that the other findings of the trial court set forth in the next preceding paragraph are misleading half truths and that the state of affairs at the branch was entirely different from that suggested by these findings.

4. But if it be assumed for argument's sake that defendant was negligent in failing to discover

the kite, plaintiff is nevertheless precluded from recovering its payment of the four and six checks (i) because plaintiff's negligence in having failed to discover the kite proximately contributed to the damage of which it is complaining and therefore it cannot under the law recover and (ii) because of the following: Neither plaintiff nor defendant were participating in United's fraud and they were both innocent of that fraud; but the record shows without dispute that plaintiff's negligence was the primary cause of the loss which must be sustained by either one of these banks; and so under the law plaintiff must sustain this loss.

5. The trial court found that it is not true that plaintiff ever made any representation to defendant to induce it to pay any checks drawn on the Lofendo account to the order of United or to induce defendant to give any one credit for any checks drawn by United on plaintiff payable to Lofendo; and that it is not true that in reliance on any representations of plaintiff defendant ever paid any checks drawn on the Lofendo account or ever gave the Lofendo account credit for checks of United. The record shows without dispute that this finding is clearly erroneous and that plaintiff made the misrepresentations to defendant already mentioned with respect to United's account with plaintiff and its financial position and standing in order to induce defendant to pay checks drawn on the Lofendo account to the order of United and to induce defendant to give credit for checks drawn by United on plaintiff payable to Lofendo; that defendant

relied upon such representations and that such representations were fraudulent, because even if plaintiff did not actually know they were false plaintiff made them without reasonable ground for believing them to be true.

VII. Point in Conclusion.

The trial court's finding that defendant is indebted to plaintiff in the amounts specified in paragraph XXX of the findings is for the reasons indicated by these points clearly erroneous.

Dated July 31st, 1951.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &
TULLEY,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 31, 1951.

[Title of Court of Appeals and Cause.]

Application That Exhibits May Be Considered in
Their Original Form and Need Not Be Printed

Bank of America National Trust and Savings Association, the defendant and the appellant in the above-entitled action, alleges as follows:

That upon the trial of the above-entitled action the plaintiff introduced exhibits which were numbered Exhibit 1 to and including 34, and the defendant introduced exhibits which were lettered A to and including Exhibit YY; that said action involved a controversy between your appellant and Merchandise National Bank, plaintiff and appellee; that several of said exhibits designated either by one letter or one number consisted of not one paper but large groups of papers; that many of said exhibits consisted of cancelled checks, deposit tags, ledger sheets, remittance sheets, bookkeeping records, and similar documents; that it would be difficult and most expensive to reproduce exhibits of the sort just described in the printed record to be used on this appeal; that appellant intends to designate as part of such record certain stipulations of fact which were marked as exhibits and certain important letters and telegrams which were marked as exhibits; that it will not cause this Court any inconvenience in considering this appeal to consider the other of said exhibits in their original form because most of the facts established thereby are either stipulated to or undisputed and

so such facts can be stated in the briefs of either of the parties and will not be challenged by the other with the result that reference to said other exhibits will for the most part be unnecessary on the appeal; that it may be necessary for this Court on the appeal to examine a few of said other exhibits (those not to be included in the printed record if this application is granted) for the purpose of determining its form and general character, but in such cases it will be, in our opinion, more advantageous for this Court to examine the exhibit itself than to examine a printed reproduction of it.

Wherefore, appellant prays for an order that on this appeal the exhibits shall be considered in their original form instead of reproducing them in the printed record, except that either party to said appeal may designate as part of the printed record any exhibit which it deems material to the consideration of the appeal.

Dated July 31, 1951.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &
TULLY,

Attorneys for Defendant and
Appellant.

It is hereby stipulated that the foregoing application may be granted provided, however, if appellee designates any exhibit or exhibits for printing in the record, its right to costs with respect to the expense of printing said exhibits shall be determined as if the foregoing application had not been granted, so that if appellee becomes entitled to its costs on this appeal its right thereto shall not be prejudiced by this stipulation or the order entered thereon.

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

/s/ THOMAS P. RIORDAN,

Attorneys for Plaintiff and
Appellee.

So Ordered.

/s/ WILLIAM DENMAN,

/s/ WILLIAM HEALY,

/s/ WM. E. ORR,

Judges U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed August 2, 1951.